Petition

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81-978

In The

Supreme Court of the United States

OCTOBER TERM, 1981

No. _____

GLITSCH, INC.,

Petitioner,

vs.

BENNIE D. JONES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether an individual Title VII claimant may establish a prima facie case of employment discrimination in failing to receive a job without proving he is qualified for the job.

2. Whether an employer in an individual Title VII action may be required to bear the burden of proving, "by clear and convincing evidence", that the employee was not qualified for the job being sought.

3. Whether, as a condition to recovery of lost wages, an individual Title VII claimant must prove that he sustained economic loss from the alleged discrimination.

PARTIES BELOW

The caption of the case in this Court contains the names of all parties to the proceedings before the United States Court of Appeals for the Fifth Circuit.

RULE 28.1 LISTING

Glitsch, Inc. is a wholly owned subsidiary of Foster-Wheeler Energy Corporation. The only subsidiary of Glitsch, Inc. that is now wholly owned is Century Plastics Incorporated.

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No. _____

GLITSCH, INC.,

Petitioner,

vs.

BENNIE D. JONES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Glitsch Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 21, 1981, with rehearing denied on October 14, 1981, and the opinions supporting such judgment that were entered on December 23, 1980 and August 21, 1981.

OPINION BELOW

This is the second occasion this matter has been before this Court.

Prior to the first presentation of the case to this Court,

the Court of Appeals entered an opinion and order on petition for rehearing and these are included in Appendix A hereto. Upon being presented with this matter the first time, this Court entered an order remanding the case to the Court of Appeals for reconsideration. The order of remand of this Court appears in Appendix B hereto.

Following the remand from this Court, the Court of Appeals entered a second opinion and order on petition for rehearing which are not reported and appear in Appendix C hereto.

The trial before the United States District Court for the Northern District of Texas was bifurcated. The findings and conclusions of the District Court with respect to the liability phase of trial, which are not reported, appear in Appendix D hereto. The opinion of the District Court with respect to the remedy phase of trial is reported at 489 F. Supp. 990 and appears in Appendix E hereto.

JURISDICTION

The first opinion of the Court of Appeals was entered on December 23, 1980. A timely petition for rehearing with a suggestion that the rehearing be en banc was denied on March 4, 1981. Subsequently, this Court vacated the first judgment of the Court of Appeals and remanded this case to the Court of Appeals for further consideration in light of *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). On August 21, 1981, the Court of Appeals entered its second opinion. Another timely petition for rehearing with a suggestion that the rehearing be en banc was denied on October 14, 1981. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute involved is 42 U.S.C. § 2000e, *et seq.*, which

provides, in pertinent part:

> "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin * * *."

STATEMENT OF THE CASE

This action was brought by respondent, Bennie D. Jones ("Jones"), a black male, against his employer, petitioner Glitsch, Inc. (the "Company" or "Glitsch"), seeking relief for alleged discrimination in employment on the basis of race. Specifically, Jones claimed that the failure of the Company to transfer him to another job upon his return to work, following two injuries to his back, and his subsequent termination by the Company due to his incapacity were prompted by racial discrimination. The Company, of course, denied these allegations.

After the completion of discovery, the District Court bifurcated the trial of the action and, as a result, heard evidence on the liability phase of the case first (see R. II and III). In finding liability on the part of the Company, the District Court held that:

> "In order to establish a *prima facie* case, Plaintiff was required to show initially (1) that he is black, (2) that he was discharged by Defendant, and (3) that there was a causal connection between his race and his discharge."[1] (Appendix D at 8; R. I 178 [italics in original]

Most significantly, the findings of the District Court

[1] Citations to the Record on Appeal in the Court of Appeals below, consisting of four volumes, will be indicated by the letter "R", followed by the volume and page number to which reference is made; where appropriate, parallel citations to the appendices hereto are included.
Unless otherwise indicated, all emphases are supplied by counsel.

are bereft of affirmative findings that Jones was physically qualified to hold any particular job at the Company. To the contrary, the District Court specifically found that "[a]t the time of his discharge, Jones was not physically able to handle his duties" at the Company (Appendix D at 6; R. I 175).[2]

Subsequent to the liability phase, the District Court conducted a second hearing and received evidence on the remedy phase of the case (see R. IV). Having failed to consider the issue of qualifications at the liability hearing, the District Court was obliged to address the matter at the remedy stage, as Jones sought to be reinstated to one of six positions with the Company. At this point, however, the District Court required the Company, rather than Jones, to carry the burden on this issue. Moreover, the District Court required the Company to establish a lack of qualifications "by clear and convincing evidence" (Appendix E at 10; R. IV 14-15).

At the conclusion of the second hearing the District Court noted the arguments being advanced by Glitsch and, based thereon, outlined the questions to be briefed by counsel. In doing so, the District Court described the standard of proof he was applying:

> "[I]t seems to me that there is a position being taken here [by Glitsch] no way this man could be reinstated, no way he could be entitled to any pay. Assuming that everything — just assuming for the sake of argument that it [i.e., Glitsch's position] is established *by the clear and convincing evidence which is required, which is a heavy burden*, that there is no job out there that the Plaintiff can do,

[2] This finding was supported by abundant evidence as Jones admitted shortly after his back injuries that "I can't do much of anything" (R. IV 39). By the liability phase of the trial, his condition was — as he testified — worse than at the time of his injuries (R. II 115). By the remedy phase of trial, his condition was even worse than it had been at the liability phase (R. IV 41).

> never has been an opening and if there were one, he doesn't have the skill or the qualification, what is your view of the area of remedy?" (R. IV 203).

Later, after considering the briefs filed by the parties, the District Court concluded that:

> "Glitsch has demonstrated by 'clear and convincing evidence' that Jones was not in 197[illegible] qualified (physically or by his skills) to perform five of the six light duty jobs he wants" (Appendix E at 10; R. I 259).

In finding Jones entitled to back pay for the sixth position, however, the District Court held that Glitsch had failed to present the "clear and convincing" evidence that Jones was unqualified (*see* Appendix E at 4, 5; R. I 260).

Subsequently, the District Court entered a judgment awarding Jones a monetary recovery for his alleged loss resulting from the claimed discrimination (R. I 264). Significantly, while finding that the Company had discriminated against Jones and compensating him for his claimed loss, the District Court denied Jones his request for reinstatement because of his physical incapacity (*see* Appendix E at 8; R. I 264).

Initially, the judgment rendered by the District Court was affirmed in all respects by the Court of Appeals. In doing so, the Court of Appeals adopted the District Court's articulation of the elements of a prima facie case and its specification and allocation of the standard of proof at the trial of the remedy phase of the case.

Subsequently, this Court remanded the case to the Court of Appeals for further consideration in light of *Texas Department of Community Affairs v. Burdine*, 450

U.S. 248 (1981). The Court of Appeals, however, again affirmed the District Court's decision. In reaching that result the Court of Appeals held that the District Court appropriately required Glitsch to prove that no positions were available for which Jones was qualified (*see* Appendix C at 4).

REASONS FOR GRANTING THE WRIT

I.

The decision below conflicts with decisions of this Court. In the seminal case of *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), this Court held that an individual claimant in a Title VII case is required to establish a prima facie case of employment discrimination and outlined the essential elements of that burden as follows:

> "(i) that he belongs to a racial minority; (ii) *that he applied and was qualified for a job for which the employer was seeking applicants;* (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications" (411 U.S. at 802).

Departing from this analytical framework, both the District Court and the Court of Appeals concluded that the elements of the prima facie case required of Jones in this suit were:

> "(1) that he is black; (2) that he was discharged by Defendant; and (3) that there was a causal connection between his race and his discharge" (Appendix D at 8; R. 178; Appendix A at 3-4).[3]

[3] As a preliminary matter, it must be noted that although the District Court and Court of Appeals both focused on discharge, Jones himself did not complain of his termination from his position as a fork

This Court has stated that the prima facie case is designed to insure that "any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was *based on* a discriminatory criterion"[4] — in other words, that there was a causal connection between the employee's race and the employer's action. However, in stating the third "element" of the prima facie case applied here — *i.e.*, a causal connection between the employee's race and the challenged employment conduct — the District Court and the Court of Appeals did nothing more than restate the purpose and function of the prima facie case, not its elements. Both the District Court and the Court of Appeals failed to articulate what factual showing would suffice to establish the required causal connection between Jones' race and his failure to receive a different job at the Company.

Although this Court has recognized that the facts of Title VII cases may vary and that the elements outlined in *McDonnell Douglas* are "not necessarily applicable in *every* respect to differing factual situations" (411 U.S. at 802 n.13), it has nevertheless emphasized that certain aspects of the prima facie case are essential. For example, in *International Brotherhood of Teamsters v. United*

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lift operator at Glitsch; he asserted, and the District Court found, that he was physically unable to perform that job. Rather, Jones complained of Glitsch's failure to transfer him to some other "lighter duty" position. Thus, both the District Court and Court of Appeals articulated elements purportedly applicable to a discharge case, when the suit before it involved a failure to transfer or reassign. That error, however, was but the prelude and precipitant for a more fundamental error.

[4] International Brotherhood of Teamsters v. United States, 431 U.S. 324, 358 (1977).

States, 431 U.S. 324, 358 n. 44 (1977), this Court observed that:

> "[T]he *McDonnell Douglas* formula * * * does demand that the alleged discriminatee demonstrate *at least* that his rejection did not result from the two more common legitimate reasons an employer might rely on to reject an applicant: [1] *an absolute or relative lack of qualifications* or [2] the absence of a vacancy in the job sought."

Furthermore, this Court recently reiterated this holding by cautioning that:

> "The plaintiff must prove by a preponderance of the evidence that she applied for [1] an available position, [2] *for which she was qualified*, but was rejected under circumstances which give rise to an inference of unlawful discrimination. The prima facie case serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection."

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). This principle is, of course, entirely consistent with the underlying purpose of Title VII itself. As this Court aptly observed in *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31, 436 (1971):

> "Congress did not intend by Title VII to guarantee a job to every person regardless of qualifications.
>
> * * *
>
> * * * Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor."

In following the dictates of this Court, other Courts of Appeals have recognized that, despite the flexibility of proof envisioned by *McDonnell Douglas*, a plaintiff must at the very least prove his qualifications in order to

establish a prima facie case of discrimination. *See, e.g., Aikens v. United States Postal Service Board of Governors*, 23 EPD ¶ 31,144, at 16,900 (D.C. Cir. 1980).

In this case, however, Jones did not establish his qualifications for any particular job at the Company as part of his prima facie case. Indeed, Jones argued that he was not required to make such a showing as part of his prima facie case, and the District Court and the Court of Appeals agreed. Moreover, Jones did not advance or introduce proof of facts which would substitute for the absence of these critically significant elements or establish their irrelevance in the instant case.[5]

Instead, Jones argued, and the District Court and the Court of Appeals apparently accepted, that his prima facie case was satisfied by showing:

> "(a) that he is black; (b) that he was performing a job which he became unable to perform; (c) that he was fired as a result; and (d) that the employer did not fire others who became unable to perform, but reassigned them to different job duties instead" (Brief of Appellee at 14).

Notably absent from Jones' formulation, of course, is any reference to his qualifications for an opening in a particular job.

In essence, Jones, the District Court, and the Court of Appeals have concluded that a causal connection between Jones' race and his failure to receive a transfer to one of the jobs sought was established merely by showing that others were so transferred. If such a minimum of

[5] Jones did not, for example, attempt to establish that Glitsch reassigned injured non-blacks who became unable to perform their duties to different jobs, *regardless* of their qualifications. Furthermore, the District Court did not make any finding to that effect.

proof was all that was required under the holdings of this Court, however, the plaintiff in *McDonnell Douglas* could have satisfied his burden by showing that he applied for a job but failed to receive it, while others applied for and did receive jobs. The decisions of this Court in *McDonnell Douglas, International Brotherhood of Teamsters,* and *Burdine*, however, make clear that the causal connection is not established in this fashion. In each such case the claimant's qualifications for an open position were stated to be an essential element of his proof.

The flexibility of proof envisioned by this Court was never intended to extend to the point where job qualifications — so important to the drafters of Title VII — became irrelevant. By eliminating these elements from the prima facie case, the District Court and the Court of Appeals have ignored the controlling precedent of this Court; have established a conflict with decisions of other Courts of Appeals; and have effectively disembowelled the underlying purpose and function of the prima facie case in Title VII actions.

II.

This case also presents an important procedural issue that has not been, but should be, settled by this Court. As noted above, the District Court did not require Jones to establish his qualifications as part of his prima facie case. Moreover, the District Court failed to consider the issue of such qualifications in reaching its decision as to liability despite evidence of Jones' lack of qualifications adduced at that stage. Indeed, the District Court did not address the issue of qualifications until later — at the remedy phase of the trial, *after* it had already found the

Company liable for discrimination. Most significantly, having already found it liable for discrimination, the District Court at the remedy phase placed the burden on the Company to prove that Jones lacked the necessary qualifications "by clear and convincing evidence". In following this procedure the District Court relied on the line of cases holding that once discrimination is proved, the employer has the burden to show by clear and convincing evidence that the claimant is not entitled to relief.

Recognizing that Jones had not shown that he was qualified for a particular position available at Glitsch, the Court of Appeals nonetheless endorsed the District Court's approach. In its second opinion on remand from this Court, the Court of Appeals stated:

> "It was in the remedy phase that the trial court eased the burden on Jones to prove just what he would have been assigned, absent discrimination, and *looked to the employer [i.e., Glitsch] to prove that no assignments could have been found for Jones* under discrimination free circumstances (Appendix C at 4).

It is evident that the procedure followed by the District Court and approved by the Court of Appeals is untenable and undercuts inportant procedural requirements. As this Court has itself recognized, lack of qualifications is not a defense to remedy, but rather is a legitimate non-discriminatory reason for rejecting a job applicant in the first instance. *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977). As such, it is a defense to liability. Thus, even if the District Court did not require Jones to establish as part of his prima facie case that he *was* qualified for a particular

job, it should at the very least have considered the evidence presented by the Company at that stage with respect to his lack of job qualifications. This evidence clearly constituted the articulation by the Company of a legitimate non-discriminatory reason for its actions. Had it done so, the burden upon the Company as to lack of qualifications would merely have been one of producing evidence sufficient to raise an issue of fact as to that point. *See Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981).[6] By removing the issue of qualifications from Jones' prima facie case and, indeed, from the determination of liability as a whole, the District Court relieved Jones of the burden that was properly his and placed it upon the Company. Equally erroneously, it also greatly magnified the burden upon the Company beyond any proper standard.

Clearly, the separate trial of issues in a case cannot properly be used in this fashion to re-allocate or increase the burden of proof. To do so is to eviscerate the principles laid down by this Court in *McDonnell Douglas* and *Burdine.* By approving such a procedure on the part of the District Court, the Court of Appeals sanctioned a serious departure from the accepted course of judicial

[6] After this Court remanded the present action for further consideration in light of *Burdine*, the Court of Appeals held that the requirements of *Burdine* had been met. In this connection, the Court of Appeals noted that the District Court found that Jones had proven that any reasons for discharge urged by Glitsch were pretextual. The basis for this decision is erroneous in a number of respects. First, the District Court made *no* finding that Jones was qualified for any particular position available at Glitsch during the liability phase. Second, the District Court did not make any finding that injured white employees were transferred to other positions, irrespective of their qualifications. In summary, whether he was required to prove, at the liability stage, his qualifications as a part of his prima facie case or to rebut the reasons for discharge urged by Glitsch, Jones met neither burden in this case.

proceedings that calls for supervision and reversal by this Court.

III.

As this Court has recognized, one of the primary purposes of Title VII is to make persons whole for injuries suffered on account of unlawful discrimination. *See Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). Despite this fundamental principle of compensation, the Court of Appeals below allowed back pay to be awarded to an individual Title VII claimant without any proof of economic loss. Jones, at trial, did not show that he was unemployed after he left Glitsch and, thus, failed to prove that he did not receive wages from other employment following his departure. Therefore, Jones failed to establish any economic loss suffered as a result of the alleged discrimination. Indeed, the record is devoid of any evidence related to Jones' subsequent employment history.[7] Whether Jones went to work elsewhere or remained unemployed after the termination of his relationship with Glitsch remains unanswered in the record. Nonetheless, the Court of Appeals affirmed the recovery of back pay awarded to Jones by the District Court. This decision conflicts with the decisions of other Courts of Appeals in *Taylor v. Philips Industries, Inc.*, 593 F.2d 783, 786-87 (7th Cir. 1979) and *Harper v. General Grocers Co.*, 590 F.2d 713, 717 (8th Cir. 1979).

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[7] Jones has never claimed, either in the District Court or the Court of Appeals, that there is any evidence of his subsequent employment history after he left Glitsch. Instead, he has erroneously contended that the burden was on Glitsch to prove that Jones did or did not work at other jobs after his departure (Brief of Appellee at 28).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals below.

Respectfully submitted,

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Of Counsel:
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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been furnished by mail to Mr. Kenneth H. Molberg, Law Offices of James C. Barber, 5217 Ross Avenue, Dallas, Texas 75206 on _____, 1981.

Ernest E. Figari, Jr.
Counsel for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 80-1633
Summary Calendar

BENNIE D. JONES,
Plaintiff-Appellee,

versus

GLITSCH, INC.,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

(DECEMBER 23, 1980)

Before CHARLES CLARK, REAVLEY and WILLIAMS, Circuit Judges.

PER CURIAM:

Bennie D. Jones brought this race discrimination in employment suit, based on Title VII, 42 U.S.C. § 2000e *et seq.* against his former employer, Glitsch, Inc. The district court found that Glitsch had discriminated against Jones on the basis of his race when Glitsch discharged him in November 1976, rather than assigning him to lighter duty work after a work-related injury. The district court granted Jones an award of back pay and attorney's fees. We affirm.

Glitsch first argues that the trial court erred in its application of the legal standard required for the plaintiff to establish a prima facie case of employment discrimination. Glitsch urges us to require inflexible application of the criteria set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824 (1973).[1] *McDonnell Douglas* does provide the analytical framework for proof of a prima facie case of this sort, but its application necessarily varies with the differing facts of each situation. *McDonnell Douglas*, 411 U.S. at 802 n.13, 93 S.Ct. at 1824 n.13; Peters v. Jefferson Chemical Co., 516 F.2d 447, 450 (5th Cir. 1975). In view of the unusual facts presented by this case, we feel that the district judge's articulation of the requirements for a prima facie case was appropriate. If the plaintiff was able to prove: "(1) that he is black, (2) that he was discharged by the Defendant, and (3) that there was a causal connection between his race and his discharge", he has satisfied all that is required by *McDonnell Douglas*. Moreover, we cannot say that the district court's findings of fact on which he found that the plaintiff had established a prima facie case are clearly erroneous. Consequently, we affirm the district court's determina-

tion of liability.

We also affirm the district court's order concerning the remedy for Glitsch's discriminatory employment practices. In determining whether Jones was entitled to back pay, Glitsch contends that the district court improperly placed the burden on Glitsch to show by clear and convincing evidence that Jones would not have been hired absent the discrimination. This, however, is the correct standard of proof in such a situation. McCormick v. Attala County Board of Education, 541 F.2d 1094, 1095 (5th Cir. 1976) (per curiam); *see also* Marks v. Prattco, Inc., 607 F.2d 1153, 1155 (5th Cir. 1979). Nor was the district court clearly erroneous in its determination that Glitsch had failed to carry that burden regarding the position of messenger/driver.

The plaintiff is a "prevailing party" within the meaning of the statute, 42 U.S.C. § 2000e-5(k), and is entitled to the award of attorney's fees. He is also entitled to an additional award of attorney's fees for this appeal and we are competent to fix and award such fees in the proper case. Marston v. Red River Levee and Drainage District No. 79-1966, slip op. at 1708, 1710 (Dec. 8, 1980). Accordingly, after considering the affidavit furnished us by plaitniff's counsel, we allow an additional award of attorney's fees in the amount of $3,000. The judgment below, as supplemental is AFFIRMED.

FOOTNOTES

[1] Citations to the Record on Appeal in the Court of Appeals below, consisting of four volumes, will be indicated by the letter "R", followed by the volume and page number to which reference is made; where appropriate, parallel citations to the appendices hereto are included.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 80-1633
Summary Calendar

D. C. Docket No. CA 3 78 1039 H

BENNIE D. JONES,
Plaintiff-Appellee,

versus

GLITSCH, INC.
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

Before CHARLES CLARK, REAVLEY and WILLIAMS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

IT IS FURTHER ORDERED that defendant-appellant pay to the plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

DECEMBER 23, 1980

ISSUED AS MANDATE:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 80-1633
Summary Calendar

BENNIE D. JONES,
Plaintiff-Appellee,

versus

GLITSCH, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(March 4, 1981)

Before CHARLES CLARK, REAVLEY and WILLIAMS, Circuit Judges.

PER CURIAM:

The motion for rehearing treats our decision as holding that Glitsch had the burden of proving, by clear and convincing evidence, that Jones would not have been hired as a messenger/driver absent racial discrimination — as though and even if Jones had made no prior satisfactory proof of discrimination. We did not make that holding. The discrimination Jones proved was Glitsch's termination of Jones under a situation where, but for his race, he would have been assigned to lighter duty. After that fact determination, Glitsch faced a burden on the remedy determination.

In the second sentence of the full paragraph on page two of our prior opinion we should have said "Jones would not have been retained for other work absent the discrimination" instead of "Jones would not have been hired absent the discrimination." Perhaps we contributed to the confusion.

Once discrimination was proved, Glitsch did have a burden on the remedy phase of the case. That was the intended meaning of the subject paragraph on page two of the opinion.

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, the Petition for Rehearing En Banc is DENIED.

APPENDIX B

SUPREME COURT OF THE UNITED STATES

No. 80-1741

GLITSCH, INC.,

Petitioner,

v.

BENNIE D. JONES

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the Court of Appeals in this cause is vacated with costs, and that this cause is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Texas Department of Community Affairs v. Burdine*, 450 U.S. ___ (1981).

IT IS FURTHER ORDERED that the petitioner, Glitsch, Inc., recover from Bennie D. Jones Two Hundred Dollars ($200.00) for its costs herein expended.

June 8, 1981

Clerk's costs: $200.00

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 80-1633

BENNIE D. JONES,
Plaintiff-Appellee,

versus

GLITSCH, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

(August 21, 1981)

Before CHARLES CLARK, REAVLEY and WILLIAMS, Circuit Judges.

PER CURIAM:

The judgment of this court dated December 23, 1980 affirming the district court's judgment against Glitsch, Inc., has been vacated by the Supreme Court of the United States. The cause has been remanded to this court for further consideration in light of Texas Department of Community Affairs v. Burdine, 450 U.S. ___ (1981).

Our consideration of this record reveals no cause to change the judgment. The decision of the trial court did present the proof of discrimination paradigm as placing a burden upon the employer (in response to employee's prima facie showing) *to prove* non-discriminatory reasons for the treatment of the employee. The trial court was complying with Turner v. Texas Instruments, Inc., 555 F.2d 1251 (5th Cir. 1977), which was overruled by *Burdine*, supra. The trial court's disposition did not stop at that point, however. The court found discrimination against Glitsch: that its failure to assign Jones to lighter duty was motivated by his race and that if Jones had been non-black, Glitsch would not have discharged him as it did. The trial court specifically found that, assuming Glitsch met the *Turner* burden by proof of a legitimate reason for his treatment, Jones proved that reason to be pretextual. This finding complies with plaintiff's ultimate burden under *Burdine*, and it is amply supported by the evidence.

After 12 years of faithful service, Jones hurt his back. When the doctor allowed it, on several occasions Jones tried to resume his forklift truck work. He could not do that work and asked for something lighter. Without even discussing it with Jones, his superiors told him to go home. When he returned, he was told that he had been fired. Jones testified that he could do several other jobs

and that, when white men had been hurt (naming several), they were given lighter work. Glitsch's employee relations manager testified that they tried to accommodate an employee under those circumstances but only if work was available. A prior supervisor of Jones testified that he would give a guy lighter work if a job was available, but he admitted that he had said on his deposition that they would "try to make a job for them somewhere." On the record we cannot say the court's findings are clearly erroneous.

Having made the determination that Glitsch discriminated against Jones by discharging him under circumstances where, but for his race, he would have been assigned to lighter duty, the trial court then undertook to fashion an equitable remedy. He held a hearing for that purpose and set out his rationale in an opinion. Jones v. Glitsch, 489 Fed. Supp. 990 (N.D. Tex. 1980). Jones was awarded back pay at the lowest level job (messenger/driver) which the record reflected, deducted minimum wage pay as mitigation, and awarded stipulated attorney fees.

It was in the remedy phase that the trial court eased the burden on Jones to prove just what he would have been assigned, absent discrimination, and looked to the employer to prove that no assignments could have been found for Jones under discrimination free circumstances. To that extent we believe Fifth Circuit precedent is still sound. McCormick v. Attala County Board of Education, 541 F.2d 1094 (5th Cir. 1976). The district court's judgment is affirmed. The case is remanded to the district court for consideration and award of plaintiff's attorney fees incurred during the appeal.

AFFIRMED and REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*
UNIT A

No. 80-1633

BENNIE D. JONES,
Plaintiff-Appellee,

versus

GLITSCH, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion **August 21, 1981**)

(October 14, 1981)

Before CHARLES CLARK, REAVLEY and WILLIAMS, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of

the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

Thomas M. Reavley

United States Circuit Judge

*Former Fifth Circuit case, Section 9(1) of Public Law 96-452 — October 4, 1980.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 3-78-1039-H

BENNIE D. JONES,

Plaintiff,

vs.

GLITSCH, INC.,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff claims Defendant discriminated against him on the basis of race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et. seq., and 42 U.S.C. § 1981. The specific violations alleged are Plaintiff's discharge from employment and the employer's refusal to reassign Plaintiff to lighter work after Plaintiff suffered an on-the-job injury. The Court bifurcated the trial pursuant to Rule 42(b), Federal Rules of Civil Procedure and trial was held August 28-29, 1979, only on the issue of liability.

Findings of Fact

Parties

1. Plaintiff Bennie D. Jones ("Jones") is a Black-American male citizen who resides in Dallas County, Texas.

2. Defendant Glitsch, Inc. ("Glitsch"), is a corporation located in Dallas County, Texas, which manufactures and sells pressure vessels and trays primarily for the petroleum refining industry. At all times relevant hereto Glitsch was an employer within the meaning of 42 U.S.C. 2000e(b). In the calendar year 1976 Glitsch had approximately 950 employees at its Dallas facility where Jones was employed.

Plaintiff's Work History

3. Jones worked for Glitsch for twelve years beginning March 26, 1964. Glitsch fired Jones on November 9, 1976, and notified him of the discharge on November 16, 1976.

4. At the time Glitsch fired him Jones was working as

a Power Material Handler A. A Power Material Handler A drives a fork lift truck which moves parts and materials in the Tray Shop. Glitsch regards the fork lift operator's job to be a vital part of the manufacturing process at Glitsch. Glitsch does not consider the job to be light duty work.

5. Jones was the only witness who testified who had driven a fork lift. His job as a fork lift operator required him to drive in a cramped position inside the cab of the fork lift. The fork lift also subjects its operator to a hard, repetitive jarring motion. This job also includes manually lifting heavy loads without the assistance of the fork lift.

6. During his employment by Glitsch, Jones had also worked as an Assembler and as a Messenger Driver, and had occassionally performed other jobs in the shop.

7. During his employment at Glitsch and before he injured his back in 1976, Jones had missed very few days from work. He had received over the twelve year period two disciplinary notices for absenteeism; both notices were issued while Morris Dunn was Jones' supervisor.

8. During Jones' period of employment Glitsch gave him sixteen merit raises; on three occasions (once in 1965, and twice in 1975 while under the supervision of Morris Dunn) Jones did not receive a merit raise for which he was considered. Jones also received five general salary increases during his employment. Jones' last pay raise in December 1975 — three months before his back injury — was a merit raise.

9. Jones' supervisor Morris Dunn testified that Jones

was a good employee. Other representatives of Defendant acknowledged that Jones had a good employment record.

Injury and Discharge

10. On or about March 3, 1976, Jones injured his back while at work at Glitsch. He was referred to a physician and did not return to work until May 24, 1976. He promptly returned to work with physician's restriction of "no heavy lifting". Glitsch told Jones to return to his regular duties as fork lift operator. After a few hours at work May 24 Jones aggravated his back injury and was again sent to a physician.

11. Jones promptly reported to work again July 6, 1976, with a physician's restriction of "no heavy lifting". Glitsch again had Jones to return to his regular duties. Within a day or two Jones again complained of his back injury and was again sent to the physician.

12. On or about September 20, 1976, Jones again promptly reported to work with a release from his physician. The release did not specify any restrictions. Glitsch determined that the release was not a "full release" and told Jones not to return to work until he obtained a full release from the physician.

13. On or about November 6, 1976, Jones was released by the physician and reported to Glitsch for work on November 8. Jones believed that this release was not a full release because the doctor had told him to "take it easy". Upon reporting to work Jones was unable to perform his regular (assigned) duties because of the back injury. He inquired if there was any lighter duty work he could perform. Glitsch told Jones to "clock out

and go home", which he did.

14. On November 9, 1976, Glitsch fired Jones (without notifying him), for "inability to perform assigned duties".

15. On November 16, 1976, Jones returned to work at Glitsch after having seen his doctor November 15. Jones was then told that he had been fired November 9.

Evidence of Discrimination

16. At the time of his discharge Jones was not physically able to handle his duties as a fork lift operator. However, he was able to perform lighter duty work. Glitsch's evidence showed that at the time Plaintiff was terminated no lighter duty work was available; in view of the number of employees at Glitsch at this time, the variety of jobs and the history of some injured employees (primarily non-black – having been assigned lighter duty for temporary periods, the Court finds that this evidence is not credible.

17. Glitsch's employee relations officer, Mr. Swank, who fired Jones, felt that Jones was "faking" his back injury but was unable to say why he so believed.

18. At the time Jones was fired Glitsch had a discipline system which applied to all but the most serious offenses. Under that "progressive" discipline system Glitsch would give an employee one written warning, followed by another written warning, followed by a suspension, followed by discharge. This discipline system was applicable to Jones' situation and should have been utilized. Glitsch presented no explanation as to why this discipline system was not utilized in Jones' case.

The Court finds that Glitsch considered Jones' situation to be a disciplinary matter. Glitsch told the Equal Employment Opportunity Commission that Jones was discharged because he "failed to perform assigned duties". A Glitsch representative (Mr. Lingell) testified that Jones was discharged because of his unwillingness to attend to his work. (The stated reason in November, 1976, for Jones' termination, was "inability to perform assigned duties".)

19. On occasion Glitsch had assigned injured non-black employees to lighter duty jobs. No injured non-black employee had been treated as harshly as Jones.

20. In 1975 Glitsch terminated 45 employees "for cause" of which 20 (44%) were black and 20 were white. Black representation in Glitsch's work force was 15.1% in 1975.

In 1976, the year Glitsch fired Jones, 11 (32%) of the 34 "for cause" terminations were black employees, while the black representation in the work force at Glitsch was 17.6%.

21. Plaintiff's statistical expert testified that the 1975 and 1976 disparities between blacks fired and their representation in the work force is statistically significant. The expert testified that it was virtually impossible for this disparity to have been caused by chance. These statistics are helpful but not controlling. *McDonnell Douglas Corp. v. Green,* infra, at p. 805.

22. Glitsch did not prove a non-racial reason for the disproportionate numbers of black terminations "for cause" in 1975 and 1976.

23. Supervisors at several levels at Glitsch make discharge recommendations to higher management personnel, who make the decision to discharge an employee. The recommendation of the supervisor is customarily followed. During 1975 and 1976 there were no black supervisors and no black management personnel at Glitsch.

24. Jones' work history until his back injury shows that he was a good employee. After his back injury he returned to work promptly each time his doctor released him for work. This fact together with his prompt request for a lighter duty job shows Jones' desire to work. If he had been physically able he would be driving his fork lift.

25. Because Glitsch had assigned to lighter duty white employees who could not physically perform their regular jobs, the Court infers that the failure to assign Jones to lighter duty was motivated in part by race. If Jones had been non-black, Glitsch would have utilized its "progressive" discipline system rather than summary discharge.

Conclusions of Law

1. This Court has jurisdiction of the subject matter and the parties.

2. In order to establish a *prima facie* case, Plaintiff was required to show initially (1) that he is black, (2) that he was discharged by Defendant, and (3) that there was a causal connection between his race and his discharge. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Plaintiff established a *prima facie* case.

3. Plaintiff, having established a *prima facie* case,

Defendant had the burden of proving by a preponderance of the evidence a legitimate, non-discriminatory reason for Plaintiff's discharge. *Pond v. Braniff*, 500 F.2d 161, 167 (5th Cir. 1974); *Turner v. Texas Instruments*, 555 F.2d 1251, 1254 (CA 5, 1977). Defendant did not carry this burden of proof.

4. Even if Glitsch could be considered to have proved a legitimate, non-discriminatory reason for Jones' discharge, Jones proved by a preponderance of the evidence that the reason was pretextual.

5. Defendant discriminated against Plaintiff on account of race in violation of Title 42 U.S.C. 2000e et seq.

6. Defendant is liable to Plaintiff, and Plaintiff is entitled to a trial on the issue of remedies for this Title VII violation, on a date to be set by the Court.

DATED: October 1, 1979.

/s/ BAREFOOT SANDERS
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION
NO. 3-78-1039-H

BENNIE D. JONES,

Plaintiff,

vs.

GLITSCH, INC.,

Defendant.

MEMORANDUM OPINION

This is a suit about race discrimination in employment based on Title VII, 42 U.S.C. §§ 2000e et seq. Plaintiff Bennie D. Jones alleges that his former employer, Glitsch, Inc., discriminated against him on the basis of his race (Black-American) when Glitsch terminated him in 1976. The Court bifurcated the trial. The liability phase of the case was tried August 28-29, 1979, after which the Court entered Findings of Fact and Conclusions of Law declaring Glitsch had discriminated against Jones on the basis of race. The Court found Glitsch discriminated against Jones by discharging him rather than assigning him to lighter duty work after an on-the-job injury. On February 25, 1980, the Court heard evidence on the issue of appropriate relief.

Plaintiff asks the Court to enter an order requiring Glitsch to place him in one of six jobs Jones has identified

as "light duty" jobs.[1] He also wants the Court to enjoin Glitsch from discriminating against him on the basis of race, a hiring order, back pay, and attorney's fees. Defendent Glitsch argues that the Court should deny Jones a job at Glitsch and back pay because of his lack of physical or skill qualifications, the lack of job openings in lighter duty jobs, or both — in short, that no relief be granted to Plaintiff.

Defendant underestimates the flexible nature of the remedies provided in 42 U.S.C. § 2000e-5(g), and the insistence of the courts that relief be granted where discrimination has been found. The Court concludes that Plaintiff, having been discriminated against, is entitled to relief. Failure to give any relief to a plaintiff who has suffered a Title VII injury would thwart the purpose of the statute and contradict decisions of the United States Supreme Court and the Fifth Circuit.

I. FACTS

Briefly summarized these are the facts found by the Court on October 1, 1979, after the trial on liability. Bennie Jones, a Black-American male, had a good employment record at Glitsch, Inc. for the twelve years he worked there. Findings 1, 3, 7, 8, 9. He was a fork lift operator at the time of his termination in November 1976. During 1976 he injured his back while he was working. He tried several times to return to his job and operate the

[1] These jobs are spot welder, punch press operator, brake press operator, tool crib attendant, messenger/driver, and office clerk. The first three jobs each have an Operator A and Operator B classification. "A" jobs tend to require more skill and experience, and consequently pay better than "B" jobs. At one time Jones worked as a messenger/driver at Glitsch. He has never been on the payroll as a spot welder, punch press operator, or brake press operator, but he testified he has done these jobs occasionally while working at Glitsch as a fork lift operator.

fork lift, but he found his back injury was too painful for him to work. Finding 10. The last time he returned to work he asked for lighter duty work, but was told to go home. Finding 13. Several days later on November 9, 1976, Glitsch fired Jones, allegedly for "inability to perform assigned duties." Findings 14, 15.

Findings of Fact 16 through 25 detail the evidence supporting the Court's conclusion that Jones' discharge and the failure to assign him lighter duty work was caused in part by race discrimination. The five most important indicia of discrimination were: (1) the summary nature of the discharge and Glitsch's unexplained failure to use its progressive discipline system which would have given Jones a warning; (2) lack of credibility of Glitsch's testimony regarding the non-availability of lighter duty jobs at the time of Plaintiff's discharge; (3) disparate treatment between blacks and whites who had been injured on the job; (4) the credibility of Jones' avowed desire to work at a lighter duty job; and (5) the disproportionately high number of black discharges in 1975 and 1976.

The Court now makes the following Supplemental Findings of Fact, based on the February 25, 1980, hearing:

1. From November 8, 1976, through February 1980 Plaintiff had the physical capability and skill (with minimal training) to perform the job of messenger/driver at Glitsch.

2. Glitsch does not indefinitely retain any employee on its payroll who is physically disqualified from performing any type of light duty work, or who lacks the

requisite skills for a job. A white employee whose physical condition had deterioated like Jones' had at the time of the relief trial in February, 1980, could not have expected to be retained on the payroll indefinitely.

3. Between the time of the liability trial (August 28-29, 1979) and the relief trial (February 25, 1980) Jones' back injury had worsened to such an extent that at March 1, 1980, he was not able to perform any light duty job at Glitsch. The Court bases this finding on Jones' testimony in February about his increased difficulty in movement, and on the Court's observation of the difference between Jones' physical appearance in August 1979 and his physical appearance in February 1980.

4. Since November, 1976 there have been minimum wage jobs available in the Dallas area which could be performed by a person with a back injury with no special skills. Jones could have found such a job by using reasonable diligence.

II. RELIEF

The relief section of Title VII, 42 U.S.C. § 2000e-5(g), authorize these remedies: injunction, reinstatement or hiring, back pay, "or any other equitable relief as the court deems appropriate." Title VII has been recognized as a vehicle for giving equitable relief to those who have suffered discrimination. *United States v. Georgia Power Co.*, 474 F.2d 906, 927 (5th Cir. 1973). Glitsch contends that Jones, whom the Court has declared to be the victim of race discrimination, is not entitled to any relief. The Court profoundly disagrees.

Glitsch's argument ignores the well-established

equitable principle that equity will not tolerate a wrong without granting a remedy.

> The constant tendency of the court is to find some way in which damages can be awarded when a wrong has been done. Difficulty in ascertainment is no longer confused with right of recovery.

Story Parchment Co. v. Patterson Parchment Co., 282 U.S. 555, 565-66 (1931), quoted in *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1380 (5th Cir. 1974) (Title VII case). Furthermore, in order to implement the purposes of Title VII, this Court must give a wide scope to the relief accorded a Title VII, plaintiff. *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d at 1375; *Rowe v. General Motors Corp.*, 457 F.2d 348, 354 (5th Cir. 1972).

Controlling in the remedy phase of a Title VII suit is the "rightful place" principle. Pursuant to this principle a person discriminated against should be assured the first opportunity to move into the next available vacancy which he would have occupied but for the discrimination and which he is qualified to fill. *United States v. Georgia Power Co.*, 474 F.2d at 927; *Pettaway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 434-44 (5th Cir. 1974). Application of the "rightful place" principle is an attempt to recontruct the work history of the plaintiff as it would have been had there been no discrimination. *Clairborne v. Illinois Central Railroad*, 583 F.2d 143, 148, 149 (5th Cir. 1978).

A tacit assumption of the "rightful place" approach is that a discrimination victim must be qualified for the job he seeks in the absence of the discrimination before he is entitled to an injunction, a hiring order, or back pay. The

court in *McCormick v. Attala County Board of Education*, 541 F.2d 1094, 1095 (5th Cir. 1976) (per curiam), charted the course for evaluating the evidence at the remedy stage:

> The principles governing a discriminatee's right to back pay and individual injunctive relief in this circuit are clear. Once discrimination is proved, a presumption of entitlement to back pay and individual injunctive relief arises. The burden of proof then shifts to the employer to show by clear and convincing evidence that the discriminatee would not have been hired absent discrimination. *Mims v. Wilson*, 5 Cir. 1975, 514 F.2d 106, 110; *Cooper v. Allen*, 5 Cir. 1972, 467 F.2d 836, 840. If the employer cannot meet this burden, then back pay must be awarded unless special circumstances are present. *Pettaway v. American Cast Iron Pipe Co.*, 5 Cir. 1974, 494 F.2d 211, 253.

A. *Hiring Order*

At the time of his disability Jones was having difficulty operating the fork lift, because of his injury. He still is not physically able to perform the fork lift job, and so cannot be reinstated to that post. The position Jones would have occupied but for the discrimination — his "rightful place" — is a lighter duty job. This Court determined (October 1, 1979, Order) that Glitsch would have made available a less strenuous job for Jones if he had been white, regardless of whether an opening existed. Of course, Glitsch is not required to place Jones in a job he is not qualified to fill due to his physical condition or because he lacks the skills the job requires. *See United States v. Georgia Power Co.*, 474 F.2d at 927; *Pettaway v. American Cast Iron Pipe Co.*, 494 F.2d at 243-44. The Court must reconstruct all the evidence impacting on Jones' qualifications for a lighter duty job.

This historical reconstruction is complicated by the fact that Jones' physical condition has worsened since the date of his discharge, and has even deteriorated between the trial on liability and the trial on relief. The law requires that the reinstated person be qualified for a job before the Court will order that he be placed in that job. A hiring order is inappropriate if a person is no longer qualified for the particular position. *Kamberos v. GRE Automatic Electric, Inc.*, 603 F.2d 598, 603 (7th Cir. 1979); *cf. Donnell v. General Motors Corp.*, 576 F.2d 1292, 1303 (8th Cir. 1978) (no back pay if plaintiff cannot satisfy the physical limitations of job).

The Court is of the opinion that Jones is no longer physically qualified to fill any of the light duty jobs at Glitsch. He therefore cannot be granted a hiring order.

The Court could order Glitsch to give Jones the next available opening in a light duty job which he would have occupied but for the discriminatory discharge. *Pettaway v. American Cast Iron Pipe Co.*, 494 F.2d at 243-44; *United States v. Georgia Power Co.*, 474 F.2d at 927. Glitsch escapes this remedy only because of the fortuitous (for Glitsch) circumstance of Jones' deteriorating back injury.

B. *Injunction*

Because Jones will not be working at Glitsch in the future, an injunction to cease discriminating against him is inappropriate. Jones has requested a mandatory injunction to make his employment records reflect this Court's finding that his discharge was caused by racial discrimination. The Court doubts the efficacy of such relief. The Court does, however, direct Glitsch to delete

from Jones' employment record any references or inferences that he was discharged for "inability to perform assigned duties." This relief, which is authorized by the "other equitable remedy" language of 42 U.S.C. § *2000e-5(g), may in part prevent any future damage to Jones from his wrongful discharge by Glitsch.*

C. *Back Pay*

The Supreme Court has ruled that back pay is an integral part of the Title VII scheme. *Albermarle Paper Co. v. Moody,* 422 U.S. 405 (1975); *accord Johnson v. Goodyear Tire & Rubber Co.,* 491 F.2d 1364, 1376 (5th Cir. 1974); *United States v. Georgia Power Co.,* 474 F.2d 906, 921 (5th Cir. 1973). The Court should not decline to award back pay if to do so would undermine the two-fold purposes of Title VII: eliminating unlawful employment discrimination and compensating the economic injuries of the discrimination victim. *Albermarle Paper Co. v. Moody,* 422 U.S. at 417-19.

The District Court's discretion in declining to award back pay is very limited. *See id.* at 415-17. The rationale for this narrow discretion and the standards by which it is exercised have been stated thus:

> Because of the compensatory nature of a back pay award, and because of the "rightful place" theory, adpoted by the courts, and of the strong congressional policy, embodied in Title VII, for remedying employment discrimination, the scope of a court's discretion to deny back pay is narrow. Once a court has determined that a plaintiff or complaining class has sustained economic loss from a discriminatory employment practice, back pay should normally be awarded unless special circumstances are present.

Pettaway v. American Cast Iron Pipe Co., 474 F.2d 211, 252-53 (5th Cir. 1974). Glitsch's argument that no job openings exist does not satisfy the "special circumstances" exception. The Court has found that Glitsch would have located a lighter duty job if Jones had been white. However, Glitsch has demonstrated by "clear and convincing evidence" that Jones was not in 1976 qualified (physically or by his skills) to perform five of the six light duty jobs he wants. Of course, just as with a hiring order, a person who is no longer physically able to perform a job is not entitled to back pay during the period of his disability. *See Donnell v. General Motors Corp.*, 576 F.2d 1292, 1301 (8th Cir. 1978).

Due to his back injury Jones in 1976 could only perform light duty work, which this Court views as work which would not aggravate his back injury. Because of the back injury Jones could not have been assigned to, and can receive no back pay for, the jobs of brake press operator (which Defendant has proved requires lifting dies which weigh several hundred pounds), or punch press operator, which also require physical work beyond Jones' ability. The Court has doubts as to Jones' ablility to perform the physical work required of a tool crib attendant. Nor can Jones receive back pay for the lighter duty job of clerk-typist; he does not possess the requisite typing skills. Similarly, the spot welder post requires ablility to read blueprints, which Jones cannot do.

But there is one job at Glitsch which Jones has performed in the past, which he had the skills to perform (or with minimal training could perform) and

which does not require much physical work or skill — the position of messenger/driver. The Court believes that Jones could have performed this job during the period November 9, 1976, to March 1, 1980, and is entitled to back pay therefor. The Court finds that by March 1, 1980, Jones' back injuries had worsened to such an extent that he was unable to perform even this job, and that such condition is likely to continue.

In computing back pay, the Fifth Circuit has recognized two governing principles:

(1) Unrealistic exactitude is not required, and

(2) Uncertainties should be resolved against the disrciminating employer. *Pettaway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260-61 (5th Cir. 1974); *see also Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d at 1380, (5th Cir. 1974) (". . . In many instances proving entitlement to back pay will be based on probabilities . . . Onerous and speculative limits should not be utilized as a bar to the restoration process.") The formula for calculating back pay like all Title VII relief involves a process of historical reconstruction of plaintiff's work history. Plaintiff is entitled to back pay from the date he would have been paid (November 9, 1976) absent discrimination to the date he would have terminated employment, less mitigation.[2] *Mims v. Wilson*, 514 F.2d 106, 110 (5th Cir. 1975).

The statute directs the Court to reduce Plantiff's back pay award by "amounts earnable with reasonable

[2] Mitigation is required by 42 U.S.C. § 2000e-5(g):
"Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable."

diligence." 42 U.S.C. § 2000e-5(g). The burden of proving reasonable diligence and the amount of mitigation is upon the defendant. Glitsch's proof on mitigation was conclusory and imprecise. Two experts testified there were jobs (requiring little or no skill or physical work) available in Dallas during the relevant period which could be classified as light duty, and which jobs Plantiff could have located if he had exercised reasonable diligence; no evidence was presented from which the Court could compute the amounts earnable from such jobs. The Court has found that such jobs were available and could have been located by Jones "with reasonable diligence." Supp. Finding No. 5, *supra*. The Court will use the federal minimum wage as the basis for calculating the "amounts earnable" at such jobs.

Defendant argues that Plantiff should not be awarded any back pay because Plaintiff could have found work at a wage comparable to his wage at Glitsch. Defendant's proof did not support this contention. In any event, it would undermine the purpose of Title VII to find Glitsch guilty of discrimination and yet afford Plaintiff no significant relief, by way of back pay. If the Court sustained Glitsch's argument, any employer located in a prosperous economic area could violate the statute with impunity. The debilitating effect on Title VII of this kind of argument is obvious and the Court rejects it.

As requested by the Court the parties filed on May 16, 1980, a stipulation regarding earnings with respect to mathematical calculations of earnings, from which the Court determines that Jones should be awarded back pay in the sum of $16,594.88, which sum is computed as

follows: $34,103.68 (salary at mid-point rate for messenger driver, November 9, 1976 to March 1, 1980) less $17,508.80 (federal minimum wage for the same period).

D. *Attorney's Fees*

Defendant says Plaintiff is not a "prevailing party" within the meaning of 42 U.S.C. § 2000e-5(k), and so cannot be awarded his attorney's fees. The Court disagrees, finding that the statutory purpose and case authority are to the contrary.

Plaintiff became a "prevailing party" when the Court held with Plaintiff and determined that Glitsch had discriminated against Plaintiff on the basis of race. This finding alone entitles Plaintiff to attorney's fees. The Supreme Court in a Title II case has said a plaintiff who succeeds in proving discrimination should be awarded attorney's fees "unless special circumstances make such an award unjust." *Newman v. Piggie Park Enterprises,* 390 U.S. 400, 402 (1968). The Court has applied this standard to Title VII attorney's fees awards. *Albermarle Paper Co. v. Moody,* 322 U.S. at 415 (1975). Plaintiff does not have to be awarded all the relief he seeks to be a "prevailing party." *Brown v. Boorstin,* 471 F. Supp. 56 (D. D.C. 1978).[3] Awards of

[3] Defendant cites *Harrington v. Vandalia-Butler Bd. of Educ.*, 585 F.2d 192 (6th Cir. 1978), *cert. denied*, 99 S.Ct. 2053 (1979), for the proposition that a plaintiff must be awarded damages to be a "prevailing party." *Harrington* is inapposite because in *Harrington* plaintiff did not prevail on her claim of discriminatory discharge. Moreover, the Fifth Circuit has rejected the Sixth Circuit restrictive view of Title VII remedies. *See Clairborne v. Ill. Cent. R.R.*, 583 F.2d 143, 154 (5th Cir. 1978).

As it turns out Jones is a "prevailing party" within Defendant's interpretation of *Harrington*. He will be awarded some money as back pay. But the Court does not base the award of attorney's

attorney's fees encourage enforcement of Title VII, in accordance with the purpose of the statute and underlying public policy.

The parties have stipulated Plaintiff's attorney's fees to be $16,000. The Court finds this is a reasonable sum, and it will be awarded as part of the judgment.[4] In the event of an appeal, Plaintiff can make application for additional attorney's fees at the proper time.

Plaintiff will forthwith submit to the Court (no later than 5:00 P.M., May 29, 1980) a Judgment in accordance with this Opinion.

SO ORDERED.

DATED: May 22, 1980.

/s/ BAREFOOT SANDERS
United States District Judge

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fees on the fact that in this case the mitigation amount does not wipe out the back pay award. Even if "special circumstances" existed to justify denial of back pay, or even if the back pay was totally eliminated by actual or possible wages, this Court would still treat this plaintiff as a "prevailing party" and would award attorney's fees for the policy reasons stated in the text.

[4] The Court bases the conclusion that the stipulated fee is reasonable on these factors:

(1) The reputation, skill, and experience of Plaintiff's attorney in handling Title VII cases;

(2) The competence and aggressiveness of the defense attorney who mounted a "never give an inch" defense;

(3) The rather low rate of success of individual Title VII suits, particularly those based on subtle, nonovert, acts of discrimination.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3-78-1039-H

BENNIE D. JONES,

Plaintiff,

vs.

GLITSCH, INC.,

Defendant.

JUDGMENT

This case was tried before the Court without a jury August 28-29, 1980, as to liability, and February 25, 1980, as to remedy. On October 1, 1979, the Court filed its Findings of Fact and Conclusions of Law as to liability and on May 22, 1980, its Memorandum Opinion as to remedy, pursuant to which Plaintiff is entitled to judgment.

IT IS ORDERED, ADJUDGED AND DECREED by the Court that:

1. Plaintiff Bennie D. Jones do have and recover of and from Glitsch, Inc., the sum of Thirty-Two Thousand Five Hundred Ninety-Four and 88/100 Dollars ($32,594.88) ($16,594.88 back pay plus $16,000.00 fees for Plaintiff's counsel, Kenneth H. Molberg), with interest thereon at the rate of nine percent (9%) per annum from this date until paid.

2. Defendant shall delete from Jones' employment

record any references or inferences that Plaintiff was discharged for "inability to perform assigned duties."

3. All relief not herein granted be, and it is hereby, denied, and all costs of this action are taxed against the Defendant.

SIGNED this 30th day of May, 1980.

/s/ BAREFOOT SANDERS
United States Dictrict Judge

Opposition

No. 81-978

Office-Supreme Court, U.S.
FILED
DEC 28 1981
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1981

GLITSCH, INC.,
Petitioner,

vs.

BENNIE D. JONES,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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RESPONDENT'S COUNTERSTATEMENT OF QUESTIONS PRESENTED

Counsel for Respondent strongly disagrees with the manner in which Petitioner has framed the questions presented. Respondent would show that Petitioner's Question No. 1 mischaracterizes th proof below, inasmuch as the evidence at trial established that Respondent was qualified to perform the job in question (*see, e.g.,* R.II 103-104, 112-14; R.IV 13-15, 27-28), and the trial court so found (Appendix D, Finding of Fact 6; Appendix E, at E-2 n.1; Supplemental Finding 1, at E-3). Accordingly, Petitioner is asking the Court to assume a set of facts that do not exist. In reality, Petitioner attacks the lower court's findings as clearly erroneous rather than suggesting that the court used an improper legal standard.

With respect to Question No. 2, the lower courts held, in accordance with pronouncements of this Court, that once liability has been proved by a Title VII plaintiff, a defendent must show at the *remedy* phase that one is clearly and convincingly not entitled to relief. Again, Petitioner's argument becomes an attack upon an evidentiary finding.

With respect to Question No. 3, Petitioner again challenges the evidentiary findings of the trial court, inasmuch as the evidence presented showed that Respondent suffered economic loss—see, e.g., Plaintiff's Exhibit 21; R.IV 17-20—much of which evidence was stipulated to. *See* Appendix E, at E-12, regarding stipulation of May 16, 1980.[1]

[1]It should be noted that an affirmative answer to Question 3 and negative answers to Questions 1 and 2 as presented by petitioner would not result in a different determination of the case, inasmuch as all three questions assume a different set of facts than those actually presented.

Accordingly, Respondent sees the issues as follows:

1. Whether the finding of the trial court, that plaintiff was qualified for the job in question (Appendix D, at D-2; Appendix E, at E-3, E-10), is clearly erroneous in light of the evidence.

2. Whether the trial court improperly allocated the burden of proof at the *remedy* phase,[a] and if not, whether the findings of the trial court are clearly erroneous.

3. Whether the trial court's finding of economic harm is clearly erroneous.

---

[a] Because this issue involves the *remedy* phase of the case, the questions presented by *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), relating to the allocation of proof at the *liability* stage, are not present herein.

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No. 81-978

In The

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OCTOBER TERM, 1981

GLITSCH, INC.,

Petitioner,

vs.

BENNIE D. JONES,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

COMES NOW Respondent, Bennie D. Jones, and files this, his Brief in Opposition to Petitioner's Petition for a Writ of Certiorari, and would show as follows:

STATEMENT OF THE CASE

Because Respondent finds himself in great disagreement with Petitioner in its manner of the statement of the case, Respondent makes the following counterstatement.

Respondent Jones is a black man who resides in Dallas, Texas (R.I. 73). He was first employed by Petitioner on March 26, 1964, and worked for this employer for in excess of twelve years until he learned of his termination (of November 9, 1976)

on November 16, 1976 (R.II 103). The employer is engaged in the manufacture and supply of pressure vessels, which it sells primarily to the petroleum refining industry (R.I. 73, 172). Throughout his employment, Jones performed a variety of jobs for the company, including tray floor assembly, cab crane driver, forklift driver, punch press operator, brake press operator, spot welder and messenger driver (R.II 103, 112-14; R.IV 13-15, 27-28). At the time of his firing, he was classified as a forklift operator (hyster driver), during latter times referred to as a Power Material Handler (R.II 104; R.III 232). This is an operation considered to be of "vital" importance to Petitioner's operation (R.III 238).

During Jones' twelve and one-half years of employment by Glitsch, he received at least twenty-one raises (Px 21; R.II 49-53), five of which were of the "automatic" or "graduated" variety. The remaining sixteen were based upon "merit" (*Id.*, R.II 51). The last raise received before his termination was a merit raise (Px 21; R.II 52, 145). On only three occasions did Respondent fail to receive a raise because his supervisors felt he needed to improve. The first time was in 1965, within a year of the conclusion of his probationary period (Px 21; Dx 3; R.II 184, 85). The remaining two instances occurred some ten years later (in May and September, 1975), when Jones' supervisor was Morris Dunn (Px 21; Dx 3; R.II 167, 184). Respondent's employment records reveal that Dunn is the only supervisor to have given Jones written warnings about any aspect of his employment performance (once regarding tardiness, and once regarding

tardiness and absenteeism) (R.II 54, 141, 167; Px 21). Both notices were given more than a year prior to his firing, and it is customary that notices of this age are not taken into account after they are a year (or possibly six month) old (R.II 54). In any event, it is uncontradicted that Jones was not fired for tardiness or absenteeism (R.III 289-90; R.II 146). The only other complaint relating to Jones' performance concerned his allegedly not doing certain forklift work for some fellow employees (R.II 187). This incident apparently occurred prior to or at the time of the first written warning (R.II 182). Nevertheless, Supervisor Dunn testified that Jones asked for and received a meeting with these employees, at which time any differences were apparently resolved (R.II 187).

In sum, the record indicates that in twelve and one-half years of employment, Jones had personnel problems three times, with the worst punishment being nothing more than a written warning. In fact, Dunn, the only supervisor to ever reprimand him, and the supervisor who refers to black employees as "colored boys" (R.II 152-53, 186), admits Jones was a good employee (R.II 144).

In March of 1976, Jones sustained an injury to his back while attempting to keep a box from falling from the lift portion of his machine (R.II 104-105). This injury occurred almost twelve years to the time that he was first employed by Glitsch, and it was the first on-the-job injury Jones had sustained that resulted in any substantial lost work time (R.II 109). Jones returned to work the following May after receiving a "light duty" release from his doctor, at which time the employer placed Jones

back in the forklift operator position (R.II 105)—a position which Jones and former Glitsch Industrial Relations Manager Ron Swank agree is not "light duty" (R.II 108; R.III 240). As a result, Jones' condition was aggravated, and after performing for several hours he left work and resumed medical care (R.II 105). On approximately July 6, 1976, Jones was again released to "light duty" (R.II 106). Again he was placed in the forklift position (*Id.*). Respondent worked for several days, until his condition would no longer permit (*Id.*). In September, Jones' doctor advised him to attempt to return to "light duty" work (*Id.*). When he returned to the company, Petitioner would not allow him to resume his duties because of the medical restrictions (*Id.*). It was not until November 8, 1976, that Jones was released to return to work (*Id.*). Although the release of that date purported to be a general release, Jones testified that based upon comments made by his doctor to take it as easy as possible, he took it to be a light duty release (*Id.*). Nevertheless, Jones returned to his job and began performing his regular duties, until ——as undisputed testimony shows—he was unable to do so (R.II 106, 107). At this point, Jones requested that Petitioner allow him to perform some other type of activity which would not be as strenuous as the forklift operation, which had required him to sit in a cramped position and subjected him to repetitive hard, bouncing and jarring motion, in addition to requiring him to lift extremely heavy amounts of weight on occasions, without the aid of the lift (R.II 107, 108-109). Jones made this request because he knew that in similar situations, non-black employees with medical prob-

lems had been provided alternate job duties compatible with their physical impairments, even to the point where Glitsch "made" work for them (R.II 109-10, 150; R.IV 16-17; Px 22). This request for alternate employment was summarily denied, and Jones was simply told to "punch out and go home" (R.II 107). Plaintiff was officially terminated the following day (R.III 309; Px 20), though he was not informed of his termination for another week —when he again returned to the facility to begin work (R.II 108; R.III 309).

The stated reason for Jones' firing was "inability" to perform his duties (Px 20; R.II 33). As Gerry Lingle, Petitioner's personnel specialist, testified, this was neither the case where an employee "refuses" to perform his assigned duties, nor the case where an employee fails or refuses to return to the workplace within five days after having secured a medical release (R.II 33-34). On the other hand, the Jones situation was one where the employee returned to work at every time he was allowed (R.II 33, 105-106), and Petitioner brought forth no direct evidence to show that after Respondent's unsuccessful attempts to engage in work that he was actually capable of engaging in the forklift work.

The only hint to the contrary was in the testimony of Petitioner's former personnel relations specialist, that in his opinion Jones may have, in effect, been faking his injury, and simply "refusing" to do his job (R.III 264).[3]

[3] This is the same witness, the evidence shows, who chastised Jones before the EEOC for having filed a workers' compensation claim (Px 19; Dx 16; R.II 42-43; R.III 299), and who very probably misled the Commission's investigators by equating the Jones situation with one whereby an employee "refuses," for a five-day period, to return to work following a medical release (R.III 292-95; 289-99; Px 79).

However, it is admitted that if the company truly felt that Jones' situation was a disciplinary matter, it failed to apply its system of progressive discipline to him, which applied to all but serious offenses—among which "inability to perform assigned duties" is not included (R.II 33-34, 150-51; R.III 297-298).[4]

In any event, it is clear that in cases where non-black employees have become unable to labor in their usual job classifications, they have been given alternate employment — not terminated, as was Jones (R.II 109-110, 150; R.IV 16-17; Px 22). On numerous occasions the employer reassigned injured or ill non-blacks to other duties (R.II 109-110; R.II 149-50; Px 22). In Jones' twelve and one-half years' experience, such fact was customary in cases dealing with Caucasian employees (R.II 109-110; R.IV 16-17). This extended to the company *making* work for ill or injured non-blacks (R.II 150; R.IV 16).

REASONS FOR NOT GRANTING THE WRIT

I.

Contrary to Petitioner's assertions, the decisions of the courts below are in accord with the pronouncements of this Court. Petitioner contends for a "wooden" application of the framework of proof established in *McDonnell Douglas Corp. v.*

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[4] As noted, Jones was fired, without his knowledge, approximately one day after his return of November 8, 1976. At the time of firing, Petitioner's progressive discipline system was in effect. This applied to all but serious offenses (R.III 297-98). This system takes the form of one, then another written warning, followed by suspension and ultimately discharge, if the violation is not cured (R.II 150-51). There is no evidence that had Company officials felt that Jones could engage in his regular duties, the system would have been inapplicable. Not only was this procedure not applied to Jones, the Respondent was not even accorded the five-day grace period given to employees who *wholly* fail to return to the workplace (R.II 33).

Green, 411 U.S. 792 (1973), for a Title VII plaintiff to make out a prima facie case. Such a suggestion was rejected in *McDonnell Douglas* itself, as the Court observed that "[t]he facts necessarily will vary . . . and the specification above of the prima facie proof required [by the plaintiff] is not necessarily applicable in every respect to differing factual situations." 411 U.S. at 802 n.13. It was again rejected by this Court's recent opinion in *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, ... n.6 (1981).

In fact, Petitioner would not allow even minor flexibility in application between a factual setting such as *McDonnell Douglas* (involving hiring) and the present case (involving firing). Nevertheless, Petitioner takes the district court to task for clearly stating what the race plaintiff must show in a discharge case:

> (1) that he is black; (2) that he was discharged by defendant; and (3) that there was a causal connection between his race and his discharge.

(Appendix D, at D-7). The causal connection described by the trial court is undoubtedly at the heart of the *McDonnell Douglas* and *Burdine* formula. Far from being a deviation from the analytical framework employed therein, the lower court's language is a succinct characterization of that framework. The lower court was doing nothing more than saying that to prove discrimination, one must show a connection between race and the complained-of action.

Quite clearly, the unrebutted evidence which

showed that non-blacks in similar circumstances were retained while Jones was fired is the classic manner of proving discrimination.[5]

The evidence of disparate treatment is abundant in this cause. In many cases the Petitioner reassigned injured or ill non-black employees to other duties rather than firing them (R.II 109-110, 149-50; R. IV 16-17; Px 22). Besides the evidence proffered by Respondent himself on this score, and that provided in Plaintiff's Exhibit 22, one of Petitioner's own supervisory personnel confirmed disparate treatment:

> Q. Do you recall your answer to be, "We have had guys that has lost a finger or fingers that, just because they lost fingers, you do not just terminate them. You try to make a job for them somewhere, and we put them in a spot welder, something like that, where there is no full productivity, but that has not happened too often." Is that your statement?
>
> A. That's my statement.

(R.II 150).[6]

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[5] Petitioner insists upon pigeon-holing certain aspects of the case, or in segregating the facts one from another. In reality, the case is quite clear: Respondent, a black, was fired when he became physically unable to perform his forklift job. Nonblacks who similarly became unable to perform were not fired; instead, they were assigned light-duty work compatible with their conditions—even to the point where work was "made" or created for them. *See* Statement of the Case, *supra*.

[6] To emphasize the fact that it is more likely for blacks to be discharged, Jones brought forth statistical evidence, unrebutted, that based upon the number of terminations in 1975, the expected number of black terminations would have been 8.09, assuming a color-blind termination procedure. Instead, the number of black terminations was twenty, a result which by chance alone would occur perhaps two times in a million! (R.II 198). Such a result is "significant" in the statistical sense (R.II 196-200), in that the Z factor equals -4.62 (R.II 197); Px 24). Again, in 1976, the year of the Jones' termination, the result was significant (R.II 201 02; Px 24). *See generally Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Parson v. Kaiser Aluminum & Chem. Corp.*; 575 F.2d 1374 5th Cir. 1978).

Respondent is additionally confused by Petitioner's contention regarding lack of qualifications. Such an assertion is incorrect. There is ample evidence to support the finding that plaintiff was qualified by training and/or experience to perform numerous lighter duty jobs (R.II 103-104, 112-14; R.IV 13-15, 27-28), one of which the district court found plaintiff entitled to (Appendix E, at E-3; Appendix E, at E-10).[7] To contend this is a case where qualifications were not established is to ignore the evidence.

Obviously, there must be evidence of qualifications and job availability. *Texas Dep't of Community Affairs v. Burdine, supra,* 450 U.S. 248 (1981); *International Bhd. of Teamsters v. United States,* 431 U.S. 324, 358 n.44 (1977). It would be pure folly for Respondent to insist otherwise. The evidence is clear, however, that both existed in this cause (R.II 103-104, 112-14; R.IV 13-15, 27-28; Appendix D, at D-2; Appendix E, at E-2; Appendix E, at E-3).

To accept Petitioner's suggested approach to proving race discrimination would effectively preclude a plaintiff from being able to establish discrimination in all but those cases where the evidence is direct. One would be confined to showing that the person effecting a discharge told the dischargee, or otherwise admitted, that race was the reason. Such a holding would undercut the manner of proof described in *Texas Dep't of Com-*

[7] Even assuming petitioner may have articulated lack of qualifications as a legitimate, nondiscriminatory reason, the lower court found, on the basis of the evidence, that such proof was pretextual (Appendix D, at D-7). This is in complete accord with this Court's holding in *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248 (1981).

munity Affairs v. Burdine, supra. Respondent has clearly established a prima facie case of discrimination.

II.

Petitioner next alleges that the district court, after determining discrimination existed, misplaced the burden at the remedy phase of the case.[8] As noted by the appellate court:

> In determining whether Jones was entitled to backpay, Glitsch contends that the district court improperly placed the burden on Glitsch to show by clear and convincing evidence that [Jones would not have been retained for other work absent the discrimination.][9] This, however, is the correct standard of proof in such a situation. McCormick v. Attala County Board of Education, 541 F.2d 1094, 1095 (5th Cir. 1976) (per curiam); *see also* Marks v. Prattco, Inc., 607 F.2d 1153, 1155 (5th Cir. 1979).

Jones v. Glitsch, Inc., No. 80-1633, at 2 5th Cir., Dec. 23, 1980) (per curiam), as modified, March 4, 1981. See Appendix A. The holdings of the lower courts are clearly in accord with *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975), and counsel for Respondent knows of no conflict among the circuits with regard to this issue. *See also International Bhd. of Teamsters v. United States*, 431 U.S. 324, 361-62 (1977). Accordingly, Petitioner is once more attempting to turn an evidence ruling into

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[8] Again, Petitioner insists that proof of qualifications was lacking. Again this is incorrect. (R.II 103-104, 112-14; R.IV 13-15, 27-28); *see* Part I, *supra.*

[9] The bracketed language was added by the Fifth Circuit's opinion of March 4, 1981, to correct the opinion of December 23, 1980. *See* Appendix A, at A-7.

legal error after realizing that it cannot establish that the lower court's findings are clearly erroneous.

Again, however, petitioner injects the issue of qualifications into its argument, and again Respondent must point out that evidence of same is substantial in the record (R.II 103-104, 112-14; R.IV 13-15, 27-28). Contrary to Petitioner's bald assertion, the district court did require proof of qualifications as a part of Jones' prima facie case. *See, e.g.,* Appendix D, at D-2; Appendix E, at E-10. Moreover, the trial court took the additional step of addressing this issue by making Supplemental Findings prior to reaching the remedy aspect of the case. Appendix E, at E-3. Only after fully addressing the liability aspects did the Court then reach the question of proper remedy, noting that to defeat entitlement at that stage the defendant would have to come forward with clear proof respecting backpay, reinstatement, etc. *See* Appendix E, at E-4. It is apparent that Petitioner is merely attempting to confuse liability issues, *see Texas Dep't of Community Affairs v. Burdine, supra,* with remedy issues, *see McCormick v. Attala County Bd. of Educ.,* 541 F.2d 1094, 1095 (5th Cir. 1976) (per curiam).

III.

Next, Petitioner apparently contends that Respondent failed to show he encountered economic harm as a result of the discriminatory action. Respondent is again confused by this argument. Respondent showed he was performing a job for money, was terminated therefrom, and was not reassigned to other jobs which would have paid

him sums to which Petitioner and Respondent stipulated! Respondent knows of no other way to show economic harm. Petitioner also complains that Respondent made no proof of interim earnings, and, as such, no money recovery should be had. First, this ignores the fact that the trial court did, in fact, make an interim offset—a fact which Petitioner apparently finds no fault with, but which it nevertheless fails to point out. Secondly, since interim earnings are a defensive issue, being in the the nature of an offset, it was Petitioner's obligation to bring such evidence forward once Respondent made an initial showing of loss. *Taylor v. Phillips Indus., Inc.*, 593 F.2d 783, 787 n.5 (7th Cir. 1979); *Inda v. United Air Lines*, 405 F. Supp. 426 (N.D. Cal. 1975). If there is any error in the lower court's findings, it was in making an interim offset in light of Petitioner's failure to show its entitlement thereto. Most assuredly, such error has benefited Petitioner, not Respondent.

IV.

Finally, it should be pointed out that when this cause was last before this Court, it was remanded to the appellate court for reconsideration in light of *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Presumably, remand was required to give the Fifth Circuit an opportunity to see if the present cause contained the proper measure and the order of proof set out in *Burdine*, *i.e.*, (a) plaintiff's proof of a prima facie case, subject to rebuttal upon (b) defendant's articulation of a nondiscriminatory reason, followed by an opportunity for (c) plaintiff's proof that the articulated reason was pretextual. This the Fifth

Circuit did, pointing out clearly that even if defendent came forward with evidence of a nondiscriminatory reason for its action regarding Jones, the evidence established that such reason was pretextual, as the trial court had found. *See* Appendix C, at C-2; Appendix D, at D-7. "This finding complies with plaintiff's ultimate burden under *Burdine,* and it is amply supported by the evidence." Appendix C, at C-2.

What is important to note is that Petitioner has not alleged that Respondent failed to prove his case according to the mandates set forth in *Burdine* respecting the allocation of proof at the liability stage of an individual Title VII action. It is this issue of allocation of proof which marks the *Burdine* case as one having novel precedential repercussions in Title VII law. Aside from this issue, however, *Burdine* is simply a reaffirmation of the Court's holding in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). Thus, petitioner in this proceeding has wholly failed to point to any aspect of the instant case which departs from the central holding of *Burdine.*

SUMMARY

It is clear that the lower courts properly applied the legal precedents governing this cause. In the last analysis, Petitioner urges only that the findings of the trial court are clearly erroneous, but attempts to transform such allegations into "legal error."

REQUEST FOR ATTORNEY FEES

Respondent hereby requests the Court to establish an attorney's fee for services performed

on this matter subsequent to initial Fifth Circuit affirmance. In the alternative, Respondent requests remand to the trial court for this purpose.

CONCLUSION

For the foregoing reasons, the writ should be denied.

Respectfully submitted,

WILSON, WILLIAMS & MOLBERG
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(214) 748-5276

Kenneth H. Molberg

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the Unite States Court of Appeals for the Fifth Circuit have been furnished by mail to Mr. Ernest E. Figari, Jr., 4700 First International Building, Dallas, Texas 75270.

Kenneth H. Molberg
Counsel for Respondent

Date: 12/22/81

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 80-1633
Summary Calendar

BENNIE D. JONES,
Plaintiff-Appellee,

versus

GLITSCH, INC.,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

(DECEMBER 23, 1980)

Before
CHARLES CLARK, REAVLEY and WILLIAMS,
Circuit Judges.

PER CURIAM:

Bennie D. Jones brought this race discrimination in employment suit, based on Title VII, 4 U.S.C. §2000e *et seq.* against his former employer, Glitsch, Inc. The district court found that Glitsch had discriminated against Jones on the basis of his race when Giltsch discharged him in November 1976, rather than assigning him to lighter duty work after a work-related injury. The district court granted Jones an award of back pay and attorney's fees. We affirm.

Glitsch first argues that the trial court erred in its application of the legal standard required for the plaintiff to establish a prima facie case of employment discrimination. Glitsch urges us to require inflexible application of the criteria set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824 (1973).[1] *McDonnell Douglas* does provide the analytical framework for proof of a prima facie case of this sort, but its application necessarily varies with the differing facts of each situation. *McDonnell Douglas,* 411 U.S. at 802 n.13, 93 S.Ct. at 1824 n.13; Peters v. Jefferson Chemical Co., 516 F.2d 447, 450 (5th Cir. 1975). In view of the unusual facts presented by this case, we feel that the district judge's articulation of the requirements for a prima facie case was appropriate. If the plaintiff was able to prove: "(1) that he is black, (2) that he was discharged by the Defendant, and (3) that there was a causal connection between his race and his discharge", he has satis-

[1] "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."

fied all that is required by *McDonnell Douglas*. Moreover, we cannot say that the district court's findings of fact on which he found that the plaintiff had established a prima facie case are clearly erroneous. Consequently, we affirm the district court's determination of liability.

We also affirm the district court's order concerning the remedy for Glitsch's discriminatory employment practices. In determining whether Jones was entitled to back pay, Glitsch contends that the district court improperly placed the burden on Glitsch to show by clear and convincing evidence that Jones would not have been hired absent the discrimination. This, however, is the correct standard of proof in such a situation. McCormick v. Attala County Board of Education, 541 F.2d 1094, 1095 (5th Cir. 1976) (per curiam); *see also* Marks v. Prattco, Inc., 607 F.2d 1153, 1155 (5th Cir. 1979). Nor was the district court clearly erroneous in its determination that Glitsch had failed to carry that burden regarding the position of messenger/driver.

The plaintiff is a "prevailing party" within the meaning of the statute, 42 U.S.C. §2000e-5(k), and is entitled to the award of attorney's fees. He is also entitled to an additional award of attorney's fees for this appeal and we are competent to fix and award such fees in the proper case. Marston v. Red River Levee and Drainage District No. 79-1966, slip op. at 1708, 1710 (Dec. 8, 1980). Accordingly, after considering the affidavit furnished us by plaintiff's counsel, we allow an additional award of attorney's fees in the amount of $3,000. The judgment below, as supplemental is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 80-1633
Summary Calendar

D. C. Docket No. CA 3 78 1039 H

BENNIE D. JONES,
Plaintiff-Appellee,

versus

GLITSCH, INC.,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

Before
CHARLES CLARK, REAVLEY and WILLIAMS,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

IT IS FURTHER ORDERED that defendant-appellant pay to the plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

DECEMBER 23, 1980

ISSUED AS MANDATE:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 80-1633
Summary Calendar

BENNIE D. JONES,
Plaintiff-Appellee,

versus

GLITSCH, INC.
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

(March 4, 1981)

Before
CHARLES CLARK, REAVLEY and WILLIAMS,
Circuit Judges

PER CURIAM:

The motion for rehearing treats our decision as holding that Glitsch had the burden of proving, by clear and convincing evidence, that Jones would not have been hired as a messenger/driver absent racial discrimination—as though and even if Jones had made no prior satisfactory proof of discrimination. We did not make that holding. The discrimination Jones proved was Glitsch's termination of Jones under a situation where, but for his race, he would have been assigned to lighter duty. After that fact determination, Glitsch faced a burden on the remedy determination.

In the second sentence of the full paragraph on page two of our prior opinion we should have said "Jones would not have been retained for other work absent the discrimination" instead of "Jones would not have been hired absent the discrimination." Perhaps we contributed to the confusion.

Once discrimination was proved, Glitsch did have a burden on the remedy phase of the case. That was the intended meaning of the subject paragraph on page two of the opinion.

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, the Petition for Rehearing En Banc is DENIED.

APPENDIX B

SUPREME COURT OF THE UNITED STATES

No. 80-1741

GLITSCH, INC.,

Petitioner,

v.

BENNIE D. JONES

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the Court of Appeals in this cause is vacated with costs, and that this cause is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Texas Department of Community Affairs v. Burdine,* 450 U.S. ..... (1981).

IT IS FURTHER ORDERED that the petitioner, Glitsch, Inc., recover from Bennie D. Jones Two Hundred Dollars ($200.00) for its costs herein expended.

June 8, 1981

Clerk's costs: $200.00

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 80-1633

BENNIE D. JONES,
Plaintiff-Appellee,

versus

GLITSCH, INC.
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

(August 21, 1981)

Before
CHARLES CLARK, REAVLEY and WILLIAMS,
Circuit Judges.

PER CURIAM

The judgment of this court dated December 23, 1980 affirming the district court's judgment against Glitsch, Inc., has been vacated by the Supreme Court of the United States. The cause has been remanded to this court for further consideration in light of Texas Department of Community Affairs v. Burdine, 450 U.S. ..... (1981).

Our consideration of this record reveals no cause to change the judgment. The decision of the trial court did present the proof of discrimination paradigm as placing a burden upon the employer (in response to employee's prima facie showing) *to prove* non-discriminatory reasons for the treatment of the employee. The trial court was complying with Turner v. Texas Instruments, Inc., 555 F.2d 1251 (5th Cir. 1977), which was overruled by *Burdine,* supra. The trial court's disposition did not stop at that point, however. The court found discrimination against Glitsch: that its failure to assign Jones to lighter duty was motivated by his race and that if Jones had been non-black, Glitsch would not have discharged him as it did. The trial court specifically found that, assuming Glitsch met the *Turner* burden by proof of a legitimate reason for his treatment, Jones proved that reason to be pretextual. This finding complies with plaintiff's ultimate burden under *Burdine,* and it is amply supported by the evidence.

After 12 years of faithful service, Jones hurt his back. When the doctor allowed it, on several occasions Jones tried to resume his forklift truck work. He could not do that work and asked for something lighter. Without even discussing it with Jones, his superiors told him to go home. When he returned,

he was told he had been fired. Jones testified that he could do several other jobs and that, when white men had been hurt (naming several), they were given lighter work. Glitsch's employee relations manager testified that they tried to accommodate an employee under those circumstances but only if work was available. A prior supervisor of Jones testified that he would give a guy lighter work if a job was available, but he admitted that he had said on his deposition that they would "try to make a job for them somewhere." On the record we cannot say the court's findings are clearly erroneous.

Having made the determination that Glitsch discriminated against Jones by discharging him under circumstances where, but for his race, he would have been assigned to lighter duty, the trial court then undertook to fashion an equitable remedy. He held a hearing for the purpose and set out his rationale in an opinion. Jones v. Glitsch, 489 Fed. Supp. 990 (N.D. Tex. 1980). Jones was awarded back pay at the lowest level job (messenger/driver) which the record reflected, deducted minimum wage pay as mitigation, and awarded stipulated attorney fees.

It was in the remedy phase that the trial court eased the burden on Jones to prove just what he would have been assigned, absent discrimination, and looked to the employer to prove that no assignments could have been found for Jones under discrimination free circumstances. To that extent we believe Fifth Circuit precedent is still sound. McCormick v. Attala County Board of Education, 541 F.2d 1094 (5th Cir. 1976). The district court's judgment is affirmed. The case is remanded to the

district court for consideration and award of plaintiff's attorney fees incurred during the appeal.

AFFIRMED and REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*
UNIT A

No. 80-1633

BENNIE D. JONES,
Plaintiff-Appellee,

versus

GLITSCH, INC.,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion **August 21, 1981**)

(October 14, 1981)

Before
CHARLES CLARK, REAVLEY and WILLIAMS,
Circuit Judges.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

Thomas M. Reavley

United States Circuit Judge

* Former Fifth Circuit Case, Section 9(1) of Public Law 96-452—October 4, 1980

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 3-78-1039-H

BENNIE D. JONES,

Plaintiff,

vs.

GLITSCH, INC.,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff claims Defendant discriminated against him on the basis of race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et. seq., and 42 U.S.C. § 1981. The specific violations alleged are Plaintiff's discharge from employment and the employer's refusal to reassign Plaintiff to lighter work after Plaintiff suffered an on-the-job injury. The Court bifurcated the trial pursuant to Rule 42(b), Federal Rules of Civil Procedure and trial was held August 28-29, 1979, only on the issue of liability.

Findings of Fact

Parties

1. Plaintiff Bennie D. Jones ("Jones") is a Black-American male citizen who resides in Dallas County, Texas.

2. Defendant Glitsch, Inc. ("Glitsch"), is a corporation liocated in Dallas County, Texas, which manu-

factures and sells pressure vessels and trays primarily for the petroleum refining industry. At all times relevant hereto Glitsch was an employer within the meaning of 42 U.S.C. 2000e(b). In the calendar year 1976 Glitsch had approximately 950 employees at its Dallas facility where Jones was employed.

Plaintiff's Work History

3. Jones worked for Glitsch for twelve years beginning March 26, 1964. Glitsch fired Jones on November 9, 1976, and notified him of the discharge on November 16, 1976.

4. At the time Glitsch fired him Jones was working as a Power Material Handler A. A Power Material Handler A drives a fork lift truck which moves parts and materials in the Tray Shop. Glitsch regards the fork lift operator's job to be a vital part of the manufacturing process at Glitsch. Glitsch does not consider the job to be light duty work.

5. Jones was the only witness who testified who had driven a fork lift. His job as a fork lift operator required him to drive in a cramped position inside the cab of the fork lift. The fork lift also subjects its operator to a hard, repetitive jarring motion. This job also includes manually lifting heavy loads without the assistance of the fork lift.

6. During his employment by Glitsch, Jones had also worked as an Assembler and as a Messenger Driver, and had occasionally performed other jobs in the shop.

7. During his employment at Glitsch and before

he injured his back in 1976, Jones had missed very few days from work. He had received over the twelve year period two disciplinary notices for absenteeism; both notices were issued while Morris Dunn was Jones' supervisor.

8. During Jones' period of employment Glitsch gave him sixteen merit raises; on three occasions (once in 1965, and twice in 1975 while under the supervision of Morris Dunn) Jones did not receive a merit raise for which he was considered. Jones also received five general salary increases during his employment. Jones' last pay raise in December 1975 — three months before his back injury — was a merit raise.

9. Jones' supervisor Morris Dunn testified that Jones was a good employee. Other representatives of Defendant acknowledged that Jones had a good employment record.

Injury and Discharge

10. On or about March 3, 1976, Jones injured his back while at work at Glitsch. He was referred to a physician and did not return to work until May 24, 1976. He promptly returned to work with physician's restriction of "no heavy lifting". Glitsch told Jones to return to his regular duties as fork lift operator. After a few hours at work May 24 Jones aggravated his back injury and was again sent to a physician.

11. Jones promptly reported to work again July 6, 1976, with a physician's restriction of "no heavy lifting". Glitsch again had Jones to return to his regular duties. Within a day or two Jones again

complained of his back injury and was again sent to the physician.

12. On or about September 20, 1976, Jones again promptly reported to work with a release from his physician. The release did not specify any restrictions. Glitsch determined that the release was not a "full release" and told Jones not to return to work until he obtained a full release from the physician.

13. On or about November 6, 1976, Jones was released by the physician and reported to Glitsch for work on November 8. Jones believed that this release was not a full release because the doctor had told him to "take it easy". Upon reporting to work Jones was unable to perform his regular (assigned) duties because of the back injury. He inquired if there was any lighter duty work he could perform. Glitsch told Jones to "clock out and go home", which he did.

14. On November 9, 1976, Glitsch fired Jones (without notifying him), for "inability to perform assigned duties".

15. On November 16, 1976, Jones returned to work at Glitsch after having seen his doctor November 15. Jones was then told that he had been fired November 9.

Evidence of Discrimination

16. At the time of his discharge Jones was not physically able to handle his duties as a fork lift operator. However, he was able to perform lighter duty work. Glitsch's evidence showed that at the time Plaintiff was terminated no lighter duty work was available, in view of the number of employees

at Glitsch at this time, the variety of jobs and the history of some injured employees (primarily non-black — having been assigned lighter duty for temporary periods, the Court finds that this evidence is not credible.

17. Glitsch's employee relations officer, Mr. Swank, who fired Jones, felt that Jones was "faking" his back injury but was unable to say why he so believed.

18. At the itme Jones was fired Glitsch had a discipline system which applied to all but the most serious offenses. Under that "progressive" discipline system Glitsch would give an employee one written warning, followed by another written warning, followed by a suspension, followed by discharge. This discipline system was applicable to Jones' situation and should have been utilized. Glitsch presented no explanation as to why this discipline system was not utilized in Jones' case.

The Court finds that Glitsch considered Jones' situation to be a disciplinary matter. Glitsch told the Equal Employment Opportunity Commission that Jones was discharged because he "failed to perform assigned duties". A Glitsch representative (Mr. Lingell) testified that Jones was discharged because of his unwillingness to attend to his work. (The stated reason in November, 1976, for Jones' termination, was "inability to perform assigned assigned duties".)

19. On occasion Glitsch had assigned injured non-black employees to lighter duty jobs. No injured non-black employee had been treated as harshly as Jones.

20. In 1975 Glitsch terminaed 45 employees "for cause" of which 20 (44%) were black and 20 were white. Black representation in Glitsch's work force was 15.1% in 1975.

In 1976, the year Glitsch fired Jones, 11 (32%) of the 34 "for cause" terminations were black employees, while the black representation in the work force at Glitsch was 17.6%.

21. Plaintiff's statistical expert testified that the 1975 and 1976 disparities between blacks fired and their representation in the work force is statistically significant. The expert testified that it was virtually impossible for this disparity to have been caused by chance. These statistics are helpful but not controlling. *McDonnell Douglas Corp. v. Green,* infra, at p. 805.

22. Glitsch did not prove a non-racial reason for the disproportionate numbers of black terminations "for cause" in 1975 and 1976.

23. Supervisors at several levels at Glitsch make discharge recommendations to higher management personnel, who make the decision to discharge an employee. The recommendation of the supervisor is customarily followed. During 1975 and 1976 there were no black supervisors and no black management personnel at Glitsch.

24. Jones' work history until his back injury shows that he was a good employee. After his back injury he returned to work promptly each time his doctor released him for work. This fact together with his prompt request for lighter duty job shows Jones' desire to work. If he had been physically able he would be driving his fork lift.

25. Because Glitsch had assigned to lighter duty white employees who could not physically perform their regular jobs, the Court infers that the failure to assign Jones to lighter duty was motivated in part by race. If Jones had been non-black, Glitsch would have utilized its "progressive" discipline system rather than summary discharge.

Conclussions of Law

1. This Court has jurisdiction of the subject matter and the parties.

2. In order to establish a *prima facie* case, Plaintiff was required to show initially (1) that he is black, (2) that he was discharged by Defendant, and (3) that there was a causal connection between his race and his discharge. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). Plaintiff established a *prima facie* case.

3. Plaintiff, having established a *prima facie* case, Defendant had the burden of proving by a preponderance of the evidence a legitimate, non-discriminatory reason for Plaintiff's discharge. *Pond v. Braniff,* 500 F.2d 161, 167 (5th Cir. 1974); *Turner v. Texas Instruments,* 555 F.2d 1251, 1254 (CA 5, 1977). Defendant did not carry this burden of proof.

4. Even if Glitsch could be considered to have proved a legitimate, non-discriminatory reason for Jones' discharge, Jones proved a preponderance of the evidence that the reason was pretextual.

5. Defendant discriminated against Plaintiff on account of race violation of Title 42 U.S.C. 2000 e et seq.

6. Defendant is liable to Plaintiff, and Plaintiff is entitled to a trial on the issue of remedies for this Title VII violation, on a date to be set by the Court.

DATED: October 1, 1979.

/s/ BAREFOOT SANDERS
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

Civil Action No. 3-78-1039-H

BENNIE D. JONES,

Plaintiff,

vs.

GLITSCH, INC.,

Defendant.

MEMORANDUM OPINION

This is a suit about race discrimination in employment based on Title VII, 42 U.S.C. §§ 2000e et seq. Plaintiff Bennie D. Jones alleges that his former employer, Glitsch, Inc., discriminated against him on the basis of his race (Black-American) when Glitsch terminated him in 1976. The Court bifurcated the trial. The liability phase of the case was tried August 28-29, 1979, after which the Court entered Findings of Fact and Conclusions of Law declaring Glitsch had discriminated against Jones on the basis of race. The Court found Glitsch discriminated against Jones by discharging him rather than assigning him to lighter duty work after an on-the-job injury. On February 25, 1980, the Court heard evidence on the issue of appropriate relief.

Plaintiff asks the Court to enter an order requiring Glitsch to place him in one of six jobs Jones has

identified as "light duty" jobs.[1] He also wants the Court to enjoin Glitsch from discriminating against him on the basis of race, a hiring order, back pay, and attorney's fees. Defendant Glitsch argues that the Court should deny Jones a job at Glitsch and back pay because of his lack of physical or skill qualifications, the lack of job openings in lighter duty jobs, or both — in short, that no relief be granted to Plaintiff.

Defendant underestimates the flexible nature of the remedies provided in 42 U.S.C. § 2000e-5(g), and the insistence of the courts that relief be granted where discrimination has been found. The Court concludes that Plaintiff, having been discriminated against, is entitled to relief. Failure to give any relief to a plaintiff who has suffered a Title VII injury would thwart the purpose of the statute and contradict decisions of the United States Supreme Court and the Fifth Circuit.

I. FACTS

Briefly summarized these are the facts found by the Court on October 1, 1979, after the trial on liability. Bennie Jones, a Black-American male, had a good employment record at Glitsch, Inc. for the twelve years he worked there. Findings 1, 3, 7, 8, 9. He was a fork lift operator at the time of his termination in November 1976. During 1976 he injured his back while he was working. He tried several

[1] These jobs are spot welder, punch press operator, brake press operator, tool crib attendant, messenger/driver, and office clerk. The first three jobs each have an Operator A and Operator B classification. "A" jobs tend to require more skill and experience, and consequently pay better than "B" jobs. At one time Jones worked as a messenger/driver at Glitsch. He has never been on the payroll as a spot welder, punch press operator, or brake press operator, but he testified he has done these jobs occasionally while working at Glitsch as a fork lift operator.

times to return to his job and operate the fork lift, but he found his back injury was too painful for him to work. Finding 10. The last time he returned to work he asked for lighter duty work, but was told to go home. Finding 13. Several days later on November 9, 1976, Glitsch fired Jones, allegedly for "inability to perform assigned duties." Findings 14, 15.

Findings of Fact 16 through 25 detail the evidence supporting the Court's conclusion that Jones' discharge and the failure to assign him lighter duty work was caused in part by race discrimination. The five most important indicia of discrimination were: (1) the summary nature of the discharge and Glitsch's unexplained failure to use its progressive discipline system which would have given Jones a warning; (2) lack of credibility of Glitsch's testimony regarding the non-availability of lighter duty jobs at the time of Plaintiff's discharge; (3) disparate treatment between blacks and whites who had been injured on the job; (4) the credibility of Jones' avowed desire to work at a lighter duty job; and (5) the disproportionately high number of black discharges in 1975 and 1976.

The Court now makes the following Supplemental Findings of Fact, based on the February 25, 1980, hearing:

1. From November 8, 1976, through February 1980 Plaintiff had the physical capability and skill (with minimal training) to perform the job of messenger/driver at Glitsch.

2. Glitsch does not indefinitely retain any employee on its payroll who is physically disqualified

from performing any type of light duty work, or who lacks the requisite skills for a job. A white employee whose physical condition had deterioated like Jones' had at the time of the relief trial in February, 1980, could not have expected to be retained on the payroll indefinitely

3. Between the time of the liability trial (August 28-29, 1979) and the relief trial (February 25, 1980) Jones' back injury had worsened to such an extent that at March 1, 1980, he was not able to perform any light duty job at Glitsch The Court bases this finding on Jones' testimony in February about his increased difficulty in movement, and on the Court's observation of the difference between Jones' physical appearance in August 1979 and his physical appearance in February 1980.

4. Since November, 1976 there have been minimum wage jobs available in the Dallas area which could be performed by a person with a back injury with no special skills. Jones could have found such a job by using reasonable diligence.

II. RELIEF

The relief section of Title VII, 42 U.S.C § 2000e-5(g), authorize these remedies: injunction, reinstatement or hiring, back pay, "or any other equitable relief as the court deems appropriate." Title VII has been recognized as a vehicle for giving equitable relief to those who have suffered discrimination. *United States v. Georgia Power Co.*, 474 F.2d 906, 927 (5th Cir. 1973). Glitsch contends that Jones, whom the Court has declared to be the victim of race discrimination, is not entitled to any relief. The Court profoundly disagrees.

Glitsch's argument ignores the well-established equitable principle that equity will not tolerate a wrong without granting a remedy.

> The constant tendency of the court is to find some way in which damages can be awarded when a wrong has been done. Difficulty in ascertainment is no longer confused with right of recovery.

Story Parchment Co. v. Patterson Parchment Co., 282 U.S. 555, 565-66 (1931), quoted in *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1380 (5th Cir. 1974) (Title VII case). Furthermore, in order to implement the purposes of Title VII, this Court must give a wide scope to the relief accorded a Title VII, plaintiff. *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d at 1375; *Rowe v. General Motors Corp.*, 457 F.2d 348, 354 (5th Cir. 1972).

Controlling in the remedy phase of a Title VII suit is the "rightful place" principle. Pursuant to this principle a person discriminated against should be assured the first opportunity to move into the next available vacancy which he would have occupied but for the discrimination and which he is qualified to fill. *United States v. Georgia Power Co.*, 474 F.2d at 927; *Pettaway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 434-44 (5th Cir. 1974). Application of the "rightful place" principle is an attempt to reconstruct the work history of the plaintiff as it would have been had there been no discrimination. *Clairborne v. Illinois Central Railroad*, 583 F.2d 143, 148, 149 (5th Cir. 1978).

A tacit assumption of the "rightful place" approach is that a discrimination victim must be qualified for the job he seeks in the absence of the

discrimination before he is entitled to an injunction, a hiring order, or back pay. The court in *McCormick v. Attala County Board of Education*, 541 F.2d 1094, 1095 (5th Cir. 1976) (per curiam), charted the course for evaluating the evidence at the remedy stage:

> The principles governing a discriminatee's right to back pay and individual injunctive relief in this circuit are clear. Once discrimination is proved, a presumption of entitlement to back pay and individual injunctive relief arises. The burden of proof then shifts to the employer to show by clear and convincing evidence that the discriminatee would not have been hired absent discrimination. *Mims v. Wilson*, 5 Cir. 1975, 514 F.2d 106, 110; *Cooper v. Allen*, 5 Cir. 1972, 467 F.2d 836, 840. If the employer cannot meet this burden, then back pay must be awarded unless special circumstances are present. *Pettaway v. American Cast Iron Pipe Co.*, 5 Cir. 1974, 494 F.2d 211, 253.

A. Hiring Order

At the time of his disability Jones was having difficulty operating the fork lift, because of his injury. He still is not physically able to perform the fork lift job, and so cannot be reinstated to that post. The position Jones would have occupied but for the discrimination — his "rightful place" — is a lighter duty job. This Court determined (October 1, 1979, Order) that Glitsch would have made available a less strenuous job for Jones if he had been white, regardless of whether an opening existed. Of course, Glitsch is not required to place Jones in a job he is not qualified to fill due to his physical condition or because he lacks the skills the job

requires. *See United States v. Georgia Power Co.*, 474 F.2d at 927; *Pettaway v. American Cast Iron Pipe Co.*, 494 F.2d at 243-44. The Court must reconstruct all the evidence impacting on Jones' qualifications for a lighter duty job. This historical reconstruction is complicated by the fact that Jones' physical condition has worsened since the date of his discharge, and has even deteriorated between the trial on liability and the trial on relief. The law requires that the reinstated person be qualified for a job before the Court will order that he be placed in that job. A hiring order is inappropriate if a person is no longer qualified for the particular position. *Kamberos v. GRE Automatic Electric, Inc.*, 603 F.2d 598, 603 (7th Cir. 1979); *cf. Donnell v. General Motors Corp.*, 576 F.2d 1292, 1303 (8th Cir. 1978) (no back pay if plaintiff cannot satisfy the physical limitations of job).

The Court is of the opinion that Jones is no longer physically qualified to fill any of the light duty jobs at Glitsch. He therefore cannot be granted a hiring order.

The Court could order Glitsch to give Jones the next available opening in a light duty job which he would have occupied but for the discriminatory discharge. *Pettaway v. American Cast Iron Pipe Co.*, 494 F.2d at 243-44; *United States v. Georgia Power Co.*, 474 F.2d at 927. Glitsch escapes this remedy only because of the fortuittous (for Glitsch) circumstance of Jones' deteriorating back injury.

B. Injunction

Because Jones will not be working at Glitsch in the future, an injunction to cease discriminating

against him is inappropriate. Jones has requested a mandatory injunction to make his employment records reflect this Court's finding that his discharge was caused by racial discrimination. The Court doubts the efficacy of such relief. The Court does, however, direct Glitsch to delete from Jones' employment record any references or inferences that he was discharged for "inability to perform assigned duties." This relief which is authorized by the "other equitable remedy" language of 42 U.S.C. § *2000e-5(g), may in part prevent any future damage to Jones from his wrongful discharge by Glitsch.*

C. Back Pay

The Supreme Court has ruled that back pay is an integral part of the Title VII scheme. *Albermarle Paper Co. v. Moody,* 422 U.S. 405 (1975); *accord Johnson v. Goodyear Tire & Rubber Co.,* 491 F.2d 1364, 1376 (5th Cir. 1974); *United States v. Georgia Power Co.,* 474 F.2d 906, 921 (5th Cir. 1973). The Court should not decline to award back pay if to do so would undermine the two-fold purposes of Title VII: eliminating unlawful employment discrimination and compensating the economic injuries of the discrimination victim. *Albermarle Paper Co. v. Moody,* 422 U.S. at 417-19.

The District Court's discretion in declining to award back pay is very limited. *See id.* at 415-17. The rationale for this narrow discretion and the standards by which it is exercised have been stated thus:

> Because of the compensatory nature of a back pay award, and because of the "rightful place"

> theory, adopted by the courts, and of the strong congressional policy, embodied in Title VII, for remedying employment discrimination, the scope of a court's discretion to deny back pay is narrow. Once a court has determined that a plaintiff or complaining class has sustained economic loss from a discriminatory employment practice, back pay should normally be awarded unless special circumstances are present.

Pettaway v. American Cast Iron Pipe Co., 474 F.2d 211, 252-53 (5th Cir. 1974). Glitsch's argument that no job openings exist does not satisfy the "special circumstances" exception. The Court has found that Glitsch would have located a lighter duty job if Jones had been white. However, Glitsch has demonstrated by "clear and convincing evidence" that Jones was not in 1976 qualified (physically or by his skills) to perform five of the six light duty jobs he wants. Of course, just as with a hiring order, a person who is no longer physically able to perform a job is not entitled to back pay during the period of his disability. *See Donnell v. General Motors Corp.*, 576 F.2d 1292, 1301 (8th Cir. 1978).

Due to his back injury Jones in 1976 could only perform light duty work, which this Court views as work which would not aggravate his back injury. Because of the back injury Jones could not have been assigned to, and can receive no back pay for, the jobs of brake press operator (which Defendant has proved requires lifting dies which weigh several hundred pounds), or punch press operator, which also requires physical work beyond Jones' ability. The Court has doubts as to Jones' ability to perform

the physical work required of a tool crib attendant. Nor can Jones receive back pay for the lighter duty job of clerk-typist; he does not possess the requisite typing skills. Similarly, the spot welder post requires ability to read blueprints, which Jones cannot do.

But there is one job at Glitsch which Jones has performed in the past, which he had the skills to perform (or with minimal training could perform) and which does not require much physical work or skill — the position of messenger/driver. The Court believes that Jones could have performed this job during the period November 9, 1976, to March 1, 1980, and is entitled to back pay therefor. The Court finds that by March 1, 1980, Jones' back injuries had worsened to such an extent that he was unable to perform even this job, and that such condition is likely to continue.

In computing back pay, the Fifth Circuit has recognized two governing principles:

(1) Unrealistic exactitude is not required, and

(2) Uncertainties should be resolved against the discriminating employer. *Pettaway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260-61 (5th Cir. 1974); *see also Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d at 1380, (5th Cir. 1974) ("... In many instances proving entitlement to back pay will be based on probabilities ... Onerous and speculative limits should not be utilized as a bar to the restoration process.") The formula for calculating back pay like all Title VII relief involves a process of historical reconstruction of plaintiff's work history. Plaintiff is entitled to back pay from the date

he would have been paid (November 9, 1976) absent discrimination to the date he would have terminated employment, less mitigation.[2] *Mims v. Wilson*, 514 F.2d 106, 110 (5th Cir. 1975).

The statute directs the Court to reduce Plaintiff's back pay award by "amounts earnable with reasonable diligence." 42 U.S.C. § 2000e-5(g). The burden of proving reasonable diligence and the amount of mitigation is upon the defendent. Glitsch's proof on mitigation was conclusory and imprecise. Two experts testified there were jobs (requiring little or no skill or physical work) available in Dallas during the relevant period which could be classified as light duty, and which jobs Plaintiff could have located if he had exercised reasonable diligence; no evidence was presented from which the Court could compute the amounts earnable from such jobs. The Court has found that such jobs were available and could have been located by Jones "with reasonable diligence." Supp. Finding No. 5, *supra*. The Court will use the federal minimum wage as the basis for calculating the "amounts earnable" at such jobs.

Defendant argues that Plaintiff should not be awarded any back pay because Plaintiff could have found work at a wage comparable to his wage at Glitsch. Defendant's proof did not support this contention. In any event, it would undermine the purpose of Title VII to find Glitsch guilty of discrimination and yet afford Plaintiff no significant relief, by way of back pay. If the Court sustained Glitsch's

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[2] Mitigation is required by 42 U.S.C. § 2000e-5(g):

"Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable."

argument, any employer located in a prosperous economic area could violate the statute with impunity. The debilitating effect on Title VII of this kind of argument is obvious and the Court rejects it.

As requested by the Court the parties filed on May 16, 1980, a stipulation regarding earnings with respect to mathematical calculations of earnings, from which the Court determines that Jones should be awarded back pay in the sum of $16,594.88, which sum is computed as follows: $34,103.68 (salary at mid-point rate for messenger driver, November 9, 1976 to March 1, 1980) less $17,508.80 (federal minimum wage for the same period).

D. Attorney's Fees

Defendant says Plaintiff is not a "prevailing party" within the meaning of 42 U.S.C. § 2000e-5(k), and so cannot be awarded his attorney's fees. The Court disagrees, finding that the statutory purpose and case authority are to the contrary.

Plaintiff became a "prevailing party" when the Court held with Plaintiff and determined that Glitsch had discriminated against Plaintiff on the basis of race. This finding alone entitles Plaintiff to attorney's fees. The Supreme Court in a Title II case has said a plaintiff who succeeds in proving discrimination should be awarded attorney's fees "unless special circumstances make such an award unjust." *Newman v. Piggie Park Enterprises,* 390 U.S. 400, 402 (1968). The Court has applied this standard to Title VII attorney's fees awards. *Albermarle Paper Co. v. Moody,* 322 U.S. at 415 (1975). Plaintiff does not have to be awarded all the relief he seeks to be a "prevailing party." *Brown v.*

Boorstin, 471 F. Supp. 56 (D. D.C. 1978).[3] Awards of attorney's fees encourage enforcement of Title VII, in accordance with the purpose of the statute and underlying public policy.

The parties have stipulated Plaintiff's attorney's fees to be $16,000. The Court finds this is a reasonable sum, and it will be awarded as part of the judgment.[4] In the event of an appeal, Plaintiff can make application for additional attorney's fees at the proper time.

Plaintiff will forthwith submit to the Court (no later than 5:00 P.M., May 29, 1980) a Judgment in accordance with this Opinion.

SO ORDERED.

DATED: May 22, 1980.

/s/ BAREFOOT SANDERS
United States District Judge

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[3] Defendant cites *Harrington v. Vandalia-Butler Bd. of Educ.*, 585 F.2d 192 (6th Cir. 1978), *cert. denied*, 99 S.Ct. 2053 (1979), for the proposition that a plaintiff must be awarded damages to be a "prevailing party" *Harrington* is inapposite because in *Harrington* plaintiff did not prevail on her claim of discriminatory discharge. Moreover, the Fifth Circuit has rejected the Sixth Circuit restrictive view of Title VII remedies. *See Clairborne v. Ill. Cent. R.R.*, 583 F.2d 143, 154 (5th Cir. 1978).

As it turns out Jones is a "prevailing party" within Defendant's interpretation of *Harrington*. He will be awarded some money as back pay. But the Court does not base the award of attorney's fees on the fact that in this case the mitigation amount does not wipe out the back pay award. Even if "special circumstances" existed to justify denial of back pay, or even if the back pay was totally eliminated by actual or possible wages, this Court would still treat this plaintiff as a "prevailing party" and would award attorney's fees for the policy reasons stated in the text.

[4] The Court bases the conclusion that the stipulated fee is reasonable on these factors:

(1) The reputation, skill, and experience of Plaintiff's attorney in handling Title VII cases;

(2) The competence and aggressiveness of the defense attorney who mounted a "never give an inch" defense;

(3) The rather low rate of success of individual Title VII suits, particularly those based on subtle, nonovert, acts of discrimination.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

Civil Action No. 3-78-1039-H

BENNIE D. JONES,

Plaintiff,

vs.

GLITSCH, INC.,

Defendant.

JUDGMENT

This case was tried before the Court without a jury August 28-29, 1980, as to liability, and February 25, 1980, as to remedy. On October 1, 1979, the Court filed its Findings of Fact and Conclusions of Law as to liability and on May 22, 1980, its Memorandum Opinion as to remedy, pursuant to which Plaintiff is entitled to judgment.

IT IS ORDERED, ADJUDGED AND DECREED by the Court that:

1. Plaintiff Bennie D. Jones do have and recover of and from Glitsch, Inc., the sum of Thirty-Two Thousand Five Hundred Ninety-Four and 88/100 Dollars ($32,594.88) ($16,594.88 back pay plus $16,000.00 fees for Plaintiff's counsel, Kenneth H. Molberg), with interest thereon at the rate of nine percent (9%) per annum from this date until paid.

2. Defendant shall delete from Jones' employ-

ment record any references or inferences that Plaintiff was discharged for "inability to perform assigned duties."

3. All relief not herein granted be, and it is hereby, denied, and all costs of this action are taxed against the Defendant.

SIGNED this 30th day of May, 1980.

/s/ BAREFOOT SANDERS
United States District Judge